

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

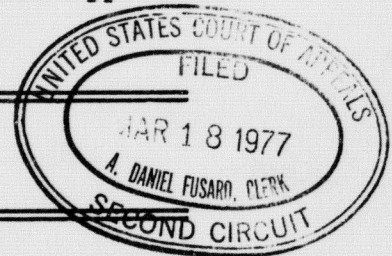
77-7008

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

ANASTASIA KANDELL,
Plaintiff-Appellant,
against

RAYDELL PUBLISHING AND DISTRIBUTING
CORPORATION EMPLOYEES PENSION PLAN,
Defendant-Appellee.

JOINT APPENDIX



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
76 CIV. 945

-----x
ANASTASIA KANDELL,

Plaintiff,

- against -

RAYDELL PUBLISHING AND DISTRIBUTING
CORPORATION EMPLOYEES PENSION PLAN,

Defendant.
-----x

RELEVANT DOCKET ENTRIES

(Pages A-D)

<u>Date</u>	<u>Proceedings</u>
2-27-76	Filed complaint and issued summons.
3-26-76	Filed answer to complaint.
6-21-76	Before Knapp, J. Non-Jury trial begun and concluded. Decision reserved.
7-21-76	Filed plaintiff's post-hearing memorandum.
11-9-76	Filed Opinion #45352...Accordingly, we find for the deft. Submit judgment. Knapp, J.

Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
12-17-76	Filed memorandum and order. Plaintiff is not entitled to pre-judgment interest, accordingly the judgment submitted by defendant has been signed. Knapp, J.
12-17-76	Filed Judgment #7,7116, the action is dismissed on the merits on tender of payment of 8,700.00 from defendant to plaintiff and defendant recover of plaintiff costs. Knapp, J. Judgment entered 12/20/76.
12-28-76	Filed Notice of Appeal by plaintiff to the U.S.C.A. from the final judgment dismissing the action on 12-20-76. Copy mailed to attorney for defendant.
1-18-77	Filed plaintiff's Supplemental Post-Hearing Memorandum.
2-1-77	Transcript of record of proceedings dated June 21-76.

Complaint

(Document No. 1)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

Plaintiff, complaining of defendant, alleges:

FIRST: The action arises under the Employee Retirement Income Security Act of 1974, 88 Stat. 891; U.S.C., Title 29, §1132, as hereinafter more fully appears.

SECOND: At all the times hereinafter mentioned, the Raydell Publishing and Distributing Corporation (hereinafter "corporation") was, and is, a corporation organized and existing under and by virtue of the laws of the State of New York, and maintains as its principal place of business, jointly with defendant, in the County of New York, State of New York.

THIRD: Defendant is a qualified pension plan created by the corporation on or about the 15th day of

Complaint

4a

November, 1971, for the purpose of providing pensions for the corporation's employees upon their attaining retirement age or otherwise qualifying and death benefits for the beneficiaries of participants in the plan.

FOURTH: From on or about the organization of the corporation to the date of his death on the 9th day of December, 1974, Irving Kandell was an officer and director of the corporation.

FIFTH: From the date of the creation of the plan to the date of his death, said Irving Kandell was a participant in the plan.

SIXTH: The plan provides, inter alia, that, upon the death of a participant, his designated beneficiary shall be entitled to receive death benefits.

SEVENTH: Plaintiff is the widow and designated beneficiary of Irving Kandell.

EIGHTH: In 1972 the plan purchased an insurance policy on the life of Irving Kandell, with plaintiff as the named beneficiary.

NINTH: Item 10 of the Adoption Agreement, as amended, reads in part as follows:

Complaint

5a

"The death benefit under this Plan shall be the full amount of any death benefit payable under a Policy plus the deceased Participant's actuarially adjusted portion of the Auxiliary Investment Fund."

TENTH: Plaintiff has been paid the proceeds of her husband's insurance policy purchased by the plan.

ELEVENTH: There is due plaintiff, as the widow and named beneficiary of Irving Kandell, the sum of seventeen thousand five hundred and sixty-two (\$17,562.00) dollars, representing Irving Kandell's actuarially adjusted portion of the Auxiliary Investment Fund, which sum the defendant has failed and refused to pay, although duly demanded.

WHEREFORE, plaintiff demands judgment against defendant in the sum of seventeen thousand five hundred and sixty-two (\$17,562.00) dollars, or such other amount as this Court may find is due plaintiff, together with interest from the 9th day of December, 1974, as well as allowing plaintiff's attorneys reasonable counsel fees for their services herein, and costs and disbursements of this action.

ENGLANDER and ENGLANDER

By S/ Herman Englander
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6a

Answer

(Document No. 3)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

1. Defendant admits the allegations of paragraphs one through ten of the complaint.
2. Defendant denies the allegations of paragraph eleven of the complaint.

WALTER HOFER

By S/ Milton I. Rothman
Member of the firm
Attorneys for Defendant
221 West 57th Street
New York, New York 10019
(212) 582-5030

7 a
Transcript of Minutes
June 21, 1976

mcsr (Document No. 12)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

ANASTASIA KANDELL, :

Plaintiff, :

- v s -

: 76 Civ. 945

RAYDELL PUBLISHING AND DISTRIBUTING :
CORPORATION EMPLOYEES PENSION PLAN, :

Defendant. :

-----x

B e f o r e :

HON. WHITMAN KNAPP,

District Judge.

New York, N. Y.
June 21, 1976 - 1:00 p.m.

A p p e a r a n c e s :

ENGLANDER & ENGLANDER, ESQS.,
Attorneys for the Plaintiff;
By: HERMAN ENGLANDER, ESQ., of counsel.

MILTON ROITMAN, ESQ.,
Attorney for the Defendant.

1
2 MR. ENGLANDER: If your Honor please, this is
3 an action for the balance claimed to be due to a widow.
4 It is an action for balance due under a pension plan.
5 There were two participants in the plan, both of whom
6 were principal stockholders in the corporation which
7 organized the plan. The husband of my client died in
8 1974 and she was paid \$100,000 under an insurance
9 policy which the plan had obtained and we are now claiming
10 a balance due from the auxiliary fund in the amount of
11 \$ 17,562.

12 It is the contention of the plan or the
13 trustee that the balance due the designated beneficiaries
14 is \$8,700, and I believe the only question in dispute
15 is the amount and how to arrive at it.

16 THE COURT: May I have those figures again?

17 MR. ENGLANDER: \$ 17,562 is what we say, and
18 they say \$8,700.

19 MR. ROITMAN: That is agreed to.

20 MR. ENGLANDER: I offer in evidence at this
21 time the prototype plan of the Guardian Life Insurance
22 Company together with the adoption agreement and the
23 amendments to this agreement and the memorandum of
24 approval from the Internal Revenue Service as one
25 exhibit.

MR. ROITMAN: No objection.

[Plaintiff's Exhibit 1 received in
evidence.]

ELLIOT WALDMAN, called as a witness
in behalf of the plaintiff, after having been duly
sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ENGLANDER:

Q Mr. Waldman, what is your business or
profession?

A I am in the consulting field. I am president
of a firm known as Compensation Planning Corporation.

MR. ROITMAN: We will concede the expertise
of Mr. Waldman.

MR. ENGLANDER: I would like to offer
the evidence of his expertise. It will only take a
minute or two.

Q How long have you been with that company?

A Eight years.

Q Are you the chief officer of the company?

A Yes, I am.

Q Will you give us your educational background,
sir?

A I am a graduate accountant. I am a graduate

1 mcsr

2 of Law School, admitted to practice in New York State.
3 I was formerly an Internal Revenue agent for four years,
4 working in the New York District Office reviewing and
5 qualifying pension and profit sharing plans for the
6 Internal Revenue Service.

7 Q Have you also been a consultant to the
8 Guardian Life Insurance Company ?

9 A I was employed by the Guardian Life Insurance
10 Company from 1965 to 1967.

11 Q In what department?

12 A In their Pension Department at the agency
13 formerly known as the Samons Press Agency.

14 Q Do you have numerous clients at the present
15 time?

16 A Yes, we have clients who have pension and
17 profit sharing plans.

18 THE COURT: All right.

19 Q Mr. Waldman, did you at the request of
20 myself and on plaintiff's account make a study of the
21 pension plan which is Exhibit 1 for the purpose of
22 determining the benefits which plaintiff, the surviving
23 widow of the designated beneficiary of the deceased
24 participant is entitled to receive?

25 A Yes, I did.

1
2 Q Would you tell us what kind of plan this is,
3 which is represented by Exhibit 1?

4 A This is defined as a non-integrated split
5 funded pension plan.

6 Q When you say non-integrated, what do you mean?

7 A Non-integrated with Social Security. There
8 is no impact that Social Security has on this program.

9 Q Who made contributions to this plan?

10 A From the documents contributions were made
11 by the employer. However, there was an option whereby
12 each employee was entitled to voluntarily contribute
13 to the program.

14 THE COURT: Additional benefits?

15 THE WITNESS: Yes, additional contribution.

16 Q Do you know whether or not anyone made
17 additional contributions ?

18 A From the records that have been shown to me
19 I cannot ascertain that.

20 THE COURT: You don't know one way or another?

21 THE WITNESS: That is right, sir.

22 Q Did you also examine the rate of compensation
23 paid to the deceased during the year 1974, which was
24 the year when the deceased died?

25 A I did.

mcsr

1 Q Do you know the amount, sir?

2 A If I may look at my own records, in the year
3 1974 it was determined that it was \$4,750 of monthly
4 compensation.
5

6 THE COURT: That much a month, when you say
7 monthly?

8 THE WITNESS: Yes.

9 MR. ENGLANDER: Will you concede that no
10 additional contribution was paid to the participant?

11 MR. ROITMAN: We will concede that.

12 Q Mr. Waldman, based upon your study of the plan
13 and the rate of compensation paid to the deceased during
14 the year 1974, did you reach a conclusion as to the
15 amount of benefits which the widow was entitled to
16 receive?

17 A Based upon that formula which has been
18 presented in the document, the decedent's heirs were
19 entitled to \$117,562 as a pre-retirement death benefit.

20 Q Will you state the reasons how you reached
21 that determination?

22 A There was an amendment to the document which
23 I believe you submitted, sir, which specifically stated
24 that there was -- Item 10 of the adoption agreement
25 specified that the death benefits under this plan shall

1 be the full amount of any death benefits payable under
2 a policy, plus the deceased participant's actuarially
3 adjusted the portion of the auxiliary vestment fund,
4 No. 1.
5

6 No. 2, in reviewing the document itself, the
7 adoption agreement that is issued by the Guardian Life
8 Insurance Company, we were able to ascertain that the
9 salary that is to be included was the entire salary,
10 including bonuses of the plan. There was no determina-
11 tion of an average and the actual compensation paid to
12 the employee for the year was the amount over the method
13 of determining the benefit. Based upon the formula
14 that is established in the plan, the individual was
15 entitled to approximately 24.75% of his monthly salary
16 as a benefit and together with the amendment which I just
17 read, he would have been entitled to a hundred times
18 the monthly pension, so, therefore, we were able to
19 ascertain that the figure, the 117,000-odd dollar figure
20 was the amount that his widow was entitled to.

21 Q You have learned or ascertained that the
22 widow has received the proceeds of the insurance policy
23 amounting to \$100,000?

24 A That is correct. That was payable by the
25 Manhattan Life Insurance Company.

1 mcsr

2 Q And the balance to come out of what fund?

3 A The balance was to come out of the auxiliary
4 fund in order to make up the difference for the amount
5 that was lacking.

6 Q You determined the balance due to be \$17,562;
7 is that correct?

8 A Correct.

9 MR. ENGLANDER: Your witness.

10 CROSS-EXAMINATION

11 BY MR. ROITMAN:

12 Q Mr. Waldman, you have seen a letter written
13 by Leonard Fisher?

14 A Yes.

15 Q In your report to Mr. Englander you referred
16 to that letter, did you not?

17 A Yes.

18 Q And you disagreed with the formula or with
19 his figures?

20 A I disagreed with his interpretation and the
21 rules that were applicable to that interpretation.

22 Q Did he not interpret the fact to be that it
23 is based upon an averaging of the five consecutive
24 highest income years in the last ten of the decedent's
25 life?

1

2

A That was his interpretation.

3

Q Do you know what he based his interpretation on?

4

5

A The only thing that I can ascertain is that it would have been based upon a revenue ruling applicable to an integrated pension plan.

6

7

8

Q And you were saying this is not an integrated plan?

9

10

A Very specifically it is not so marked by the Guardian Life Insurance Company as a non-integrated plan.

11

12

13

THE COURT: Where is that?

14

THE WITNESS: If I may, your Honor, turn to

15

Page 2 of the adoption agreement where it starts off

16

with "Raydell Publishing and Distributing Corporation."

17

If I may, sir, it is this document. It makes reference

18

to Page 2, specifically Section 6, Retirement Benefits:

19

"The plan will not be integrated with Social Security."

20

21

Q I'm sorry. Page 2 of what?

22

A The adoption agreement. You are looking

23

at the amendment. The adoption agreement.

24

THE COURT: This Guardian Life Insurance

25

Company you mentioned made the policy payable through

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1
2 some other insurance company and --

3 THE COURT: From what I gather, your Honor,
4 the Guardian Life Insurance Company did not want to
5 insure the deceased because of some medical reasons,
6 and this is also supposition on my part --

7 MR. ROITMAN: That is correct, your Honor.

8 THE WITNESS: And they took the insurance
9 and placed it with another insurance company where they
10 probably had gotten preferential rates or their standard
11 may not have been as stringent, and funded the plan on
12 that basis. They adopted an agreement which was an
13 approved agreement with the Internal Revenue Service.
14 It is is better known as a boilerplate kind of a document,
15 which is acceptable.

16 Q Can I call your attention to Article No. 4
17 on the unnumbered page of the prototype agreement.

18 A Is that the prototype agreement or the trust
19 itself?

20 Q The Guardian Life form.

21 A That is the trust agreement.

22 Q Have you found Article 4?

23 A I do not have a copy of it. Wait a minute.

24 Excuse me. May I borrow yours, Mr. Englander?

25 THE COURT: Where is that?

1 THE WITNESS: This is another document, your
2 Honor. This is an amendment to the documents. This is
3 it right here [indicating.]

4 THE COURT: What page?

5 MR. ROITMAN: Article 4. It doesn't appear to
6 be numbered, but it is about the fifth page in, Article
7 4, "Retirement and Death Benefit."

8 THE COURT: I see.

9 THE WITNESS: Yes, sir.

10 Q Can I please ask you to read aloud 4.04?

11 A Yes, sir.

12 "The participant's benefits at his normal
13 retirement date shall be based upon the average of his
14 compensation for the five highest consecutive years within
15 a period of ten years preceding the fifth anniversary
16 date prior to his normal retirement date."

17 Q May I ask you to read aloud 4.06?

18 A 4.06:

19 "The amount of pre-retirement death benefit
20 for a participant found by the insured to be insurable
21 and standard rates shall be A, under a fully insured
22 plan (i) define benefit plan 100 times the monthly
23 retirement benefit or the cash value under the policy,
24 whichever is greater.
25

mcsr

Waldman - cross

"(ii) Money purchase plan. The death benefit of the policy purchased by the contribution for each participant.

"(B) Under a combination plan as stated in the adoption agreement.

"(C) See Item 10."

Q May I ask you now, it is your contention that 4.04, the five-year average, is not in effect after reading 4.06?

A Absolutely.

Q What is your reason for the statement?

A For the simple reason that we are making reference in 4.04 to a normal retirement benefit. We are now dealing with a pre-retirement death benefit which then refers to 4.06, which says that he shall be entitled to a hundred times the monthly pension, and if you review your amendments --

Q Before we get to that, doesn't --

MR. ENGLANDER: I submit, your Honor, he should be permitted to finish his answer.

A It makes reference to the amendments, your Honor, which specifically refers to Item 10, Paragraph 4 of the amendment prepared by the attorney.

Q Who had prepared the original submission to

1
2 the Internal Revenue Service which specifically states
3 that the death benefit set forth in Item 10 --

4 THE COURT: Where is Item 10?

5 THE WITNESS: It is the typed copy here.

6 THE COURT: All right.

7 A Item 4.06 cross-references the item to Item
8 10 of the adoption agreement. The adoption agreement
9 has been amended by the item in question. It states
10 that the death benefit under this plan shall be the
11 full amount of any death benefit payable under a policy
12 plus the deceased participant's actuarially adjusted
13 portion of the auxiliary investment fund. In no event
14 shall the death benefit be greater than would be pro-
15 vided if this was a fully insured plan.

16 Q Why do you choose to select a one-year basis
17 rather than a five-year basis which is spelled out in the
18 plan?

19 A The five-year basis assumes that we are going
20 to be determining a normal retirement benefit as of the
21 date of the normal retirement age, and the trust very
22 specifically -- rather, the prototype, the adoption
23 agreement makes reference to the compensation that is not
24 to be affixed but is to give consideration to the year
25 by year income including the bonuses. There is a

1 most
2 reference under Section 4 of the adoption agreement
3 which uses a three-year average and under the definition
4 of compensation under this plan --

5 Q Where is that?

6 A If you refer to the adoption agreement,
7 Page 2, Section 4A, the second paragraph.

8 Including commissions and compensation,
9 either of these non-recurring items at the average
10 annual rate -- there is no reference to an average of
11 compensation.

12 Q I asked you if that is checked. It doesn't
13 appear to be.

14 A It does not appear to be. All I'm making
15 reference is the fact that the compensation by definition
16 in this plan uses the current compensation and does not
17 elaborate about using an average. The average that is
18 used in this particular case is language that comes
19 very specifically from the Internal Revenue Code and
20 amending regulations and revenue ruling which require
21 a five-year average. The five-year average is assuming
22 for purposes of an integrated plan in order to determine
23 an individual's benefit for integration at his normal
24 retirement age. For Social Security purposes we use
25 a five-year average. This plan is not determining the

1
2 normal retirement benefit, or the retirement benefit.
3 We are ascertaining the pre- retirement death benefit
4 and there is no reference to a salary, an average
5 salary.

6 Q Can I call your attention to Article 4 of
7 the prototype trust plan?

8 A Yes, sir.

9 Q Section 4.06.

10 A Yes, sir.

11 Q Does that not say "That the amount of retire-
12 ment death benefit for a participant found by the insured
13 to be insurable at standard rates shall be" -- and I
14 will just skip the definition -- "100 times the anticipated
15 monthly retirement benefit and the monthly retirement
16 benefit," and the monthly retirement benefit is spelled
17 out in 4.04 as the average of the compensation for the
18 highest five-year, consecutive years, within a period
19 of ten years preceding --

20 A Counsel, may I make reference to the third,
21 fourth word of that sentence, "at his normal retirement
22 date." We have not determined that he is at his normal
23 retirement yet. He has died before reaching his
24 normal retirement date, so that language has no applica-
25 tion as far as I'm concerned. On a day-to-day basis

1
2 of reviewing this plan, I would normally construct his
3 benefits based upon his current salary and not an average
4 salary. When it came to the point of making a decision
5 about his normal retirement benefit, at that moment I
6 would use some basis in order to determine the highest
7 salary that he is entitled to with the highest benefit.
8 We didn't reach that stage. We didn't reach that point.
9 He died before reaching that point. That is the con-
10 struction.

11 Q The heading of the article is "Retirement and
12 Death Benefits"; is that not right?

13 A Yes, sir.

14 Q How does one under this plan use this five-year
15 average?

16 A We use that average specifically at his
17 normal retirement age. When a man reached 65, which
18 is very specific in the trust, or in the adoption agree-
19 ment, at that moment we in theory calculate what his
20 maximum pension benefit would have been at that parti-
21 cular moment, made a determination of that benefit and
22 then paid out that benefit to him at his normal retirement
23 age.

24 I think what is confusing here is that it
25 makes reference to a retirement benefit and a death

1 benefit. In this instance we are specifically speaking
2 about a death benefit and not a normal retirement
3 benefit, because when we go down to Section 407 it speaks
4 specifically about death benefit for the individual,
5 and Section 406 talks about the death benefit and that
6 is modified by Section 10 of the adoption agreement
7 which specifies exactly what he is entitled to plus the
8 addendum to it that was prepared by the counsel in this
9 case.
10

11 Q I refer you to that addendum.

12 A Yes, sir.

13 Q Would you read Paragraph No. 1?

14 THE COURT: What is the addendum?

15 MR. ROITMAN: That is the page immediately
16 after the IRS letter.

17 A "Amount of insurance for participant who was
18 found to be insurable only at substandard rate shall
19 be in all respects similar to that for a participant
20 who is insurable at standard rates."

21 THE COURT: I don't seem to have that.

22 A That is the first section. That is making
23 reference to the 4.07 and it is exactly what I read,
24 your Honor.

25 Q Was Mr. Kandell insurable at substandard rates?

1 A I have no understanding of what his insurability
2
3 was or his non-insurability.

4 Q If I told you he had a history of heart
5 trouble before he took this policy, would that indicate
6 that he would be insurable at the substandard rate?

7 A I would make a different assumption, if I may,
8 that if the Guardian Life Insurance Company didn't
9 insure him then I would assume that the Manhattan Life
10 Insurance Company did insure him, and the probability
11 was that they were able to obtain some standard of
12 insurance which was acceptable to the client.

13 At the same time, I believe that the fourth
14 paragraph, which makes reference to Section 10 or Item
15 10 of the adoption agreement has more or less tried to
16 adjust for that potential difference in that he was --
17 on a substandard basis, so they tried to make him whole
18 as much as possible and accordingly tried to give 100
19 times his monthly pension if he could not get the full
20 amount of insurance that he would have been entitled to.

21 Q In line with what you just said, I point out
22 to you the paragraph numbered 10 of the adoption agreement
23 and point out to you where it has the X in the box.

24 A The defined benefit plan --

25 THE COURT: Where is that?

1
2 THE WITNESS: This is Page 4 of the adoption
3 agreement, if I may [Indicating.]

4 A "The defined benefit plan: The death benefit
5 under the policy shall be 100 times the anticipated
6 monthly retirement benefit under the plan. See amendment."

7 Q It says 100 times the anticipated monthly
8 retirement benefit?

9 A That is right.

10 Q I again draw your attention to Section 4.04
11 of Article 4 of the prototype agreement.

12 A Yes, sir.

13 Q That says normal retirement date. You took
14 exception to that because the man had not achieved his
15 retirement date.

16 A Yes.

17 Q If we read 4.06 together with 4.04, 4.06
18 refers to Item 10 and item 10 refers to retirement
19 date, would you revise your interpretation of 4.04?

20 A Absolutely not. The purpose of a plan is
21 to review it on an annual basis and to use the language
22 of the document to the benefit of the participants
23 and to determine that benefit on the year to year
24 basis, and then to ultimately come, at his normal
25 retirement age, and to get for him the retirement

1 that he is entitled to.

2 Q The prototype plan not adopted in the adoption
3 agreement and --

4 A That is right, it is very specific that we
5 use each year's salary on its own as compared to an
6 average.

7 Q Where does it say that specifically?

8 A It says "For the purposes of the plan we
9 use the compensation for the individual," the basic
10 annual rate of anticipated -- under Page 2 of the
11 adoption agreement, 4A.

12 Q With all due respect, I don't see where this
13 gives you any formula.

14 A Then that only imposes a greater responsibility
15 on me to look at it and construct it literally and
16 say that I am going to use the compensation, which is
17 the annual rate in existence at that particular moment
18 if it refers to the basic annual rate and the compensation
19 is one-twelfth the annual rate. It doesn't tell us to
20 go into an average or anything else other than that
21 basic annual rate.

22 THE COURT: Have you got another copy of this
23 exhibit?

24 MR. ROITMAN: I have one very poor copy that is
25

1
2 hardly legible.

3 MR. ENGLANDER: This has the adoption plan
4 and the adoption plan and the amendments.

5 [Pause.]

6 Q Isn't Section 4A in effect a statement defining
7 what compensation is of the adoption agreement?

8 A It defines the compensation for purposes of
9 calculating the annual benefit of an individual.

10 Q And then doesn't Article 4 of the trust
11 agreement, Section 4.04, tell you what to do once you
12 have your definition of compensation?

13 A Yes, I then make reference to, if I may,
14 the next page, Section 6, Paragraph 1.

15 Q The next page of the --

16 A Adoption agreement, the amount of monthly --
17 if I may , "The amount of monthly retirement benefit
18 on the normal form initially be provided shall be 45
19 per cent of the participant's monthly compensation."

20 THE COURT: Where are you reading from now?

21 THE WITNESS: This is the next page on Page 3
22 of the adoption agreement talking about a non-integrated
23 defined benefit plan, and if I may.

24 Q Mr. Waldman, what was the purpose of your
25 calling our attention to Section 6, Paragraph 1?

1 mcsr
2 A To ascertain how we have determined the
3 benefit.

4 Q The formula?

5 A That is right, and also the benefits that
6 flowed thereto, and that monthly pension that is designed
7 at that particular time on a year to year basis is
8 ascertained by this section and the death benefit is
9 a direct relationship of that particular monthly pension
10 as is amended in the agreement that was prepared by
11 Mr. Fisher which tells us exactly that it will be a
12 direct relationship of 100 times the monthly pension
13 plus the amendment to Section 10.

14 Q Where in here does it say it is an average
15 of one year rather than an average of five years?
16 All these formulas are -- very well, "45 per cent of
17 participant's monthly compensation," so why do you say
18 an annual monthly compensation when the agreement says
19 five years?

20 A The agreement doesn't say five years.

21 MR. ENGLANDER: I object. It doesn't.

22 THE COURT: Where does it say five years?

23 MR. ROITMAN: Section 4 of the prototype
24 trust agreement, Subsection 4.04.

25 MR. ENGLANDER: That deals with the normal

1 retirement age.

2
3 MR. ROITMAN: Then we have come across language
4 that says "The anticipated retirement date."

5 MR. ENGLANDER: That was substituted. You
6 have an amendment there.

7 MR. ROITMAN: The amendment says "Anticipated
8 retirement."

9 MR. ENGLANDER: No.

10 THE WITNESS: I think we are avoiding one
11 other section of the adoption agreement. I make reference
12 to Section 4.05, approximately six years prior to each
13 anniversary date shall review the compensation --

14 THE COURT: What page are you on?

15 MR. ROITMAN: That is Article 4 where it
16 says --

17 THE WITNESS: "The trustee shall review
18 with you the compensation of all participants. If the
19 compensation of a participant is at such an anniversary
20 date increased or decreased since the last adjustment
21 of his benefits, or if there has been no previous
22 adjustments of his benefits since his entry date into
23 the plan, the amount of pension to which he shall be
24 considered and entitled shall be increased or reduced
25 in accordance with the formula selected in the adoption

1
2 agreement. However, no such increase or decrease in
3 pension shall be given until the anniversary date on
4 which such change in compensation shall be sufficient
5 upon the application of the formula selected in the
6 adoption agreement to cause an increase or decrease
7 in the monthly pension of at least \$10 or the purchase
8 of a \$1,000 insurance policy.

9 "Notwithstanding the foregoing provisions
10 there shall be no change in the amount of monthly
11 pension by reason of an increase or decrease in compensa-
12 tion made within five years immediately preceding the
13 normal retirement date of the participant."

14 Q Why did you call our attention to this?

15 A For the simple reason that it tells us on
16 each anniversary date we are to review the salary of
17 the individual to see if he is entitled to an increase
18 or decrease. The only time we will take an exception
19 to that is when we reach his normal retirement date
20 we will then make a determination within five years
21 preceding the normal retirement date to take into
22 account any of these changes and here it is very
23 specific. As far as I'm concerned, in reviewing a
24 plan like this I would take his salary year by year.
25 I would not adjust his salary or his benefits under

1
2 the plan from the time he is five years within his
3 normal retirement date, and this was the basis of what
4 I would be analyzing it on, a year to year basis.

5 MR. ROITMAN: I have no further questions.

6 MR. ENGLANDER: No questions.

7 [Witness excused.]

8 MR. ENGLANDER: Plaintiff rests.

9 MR. ROITMAN: I call Mr. Fishman.

10
11 S T E V E N F I S H M A N , called as a
12 witness in behalf of the defendant, after having
13 been duly sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. ROITMAN:

16 Q Mr. Fishman, what is your business or occupation?

17 A I am in the insurance business and I am
18 primarily involved with a company by the name of PFR
19 Planning, Inc. which does administration of qualified
20 pension plans.

21 Q Are you a partner in this company?

22 A Yes.

23 Q How long has this company been in existence?

24 A About six years.

25 Q Before this what was your activity?

1
2 A I was involved in the insurance and retirement
3 plan business for nine years prior to that.

4 THE COURT: Primarily previous to the six?

5 THE WITNESS: Previous to the six, but at
6 that time primarily in the insurance end of it.

7 Q Do you have any formal education in the
8 insurance field?

9 A I have taught -- I am an adjunct assistant
10 professor at the College of Insurance for the last nine
11 years. I am an enrolled actuary with the Federal
12 Government. Other than that, regular formal college.

13 THE COURT: Where are you enrolled as an
14 actuary with the Federal Government?

15 THE WITNESS: That is The Joint Board of
16 the Treasury and the Labor Department which enrolls
17 certain people with credentials to certify pension
18 plans under the New Pension Reform Act.

19 Q Did your agency write this policy?

20 A We were involved in the establishing of the
21 plan, yes.

22 Q Did you write a recommendation in which you
23 thought the proper amount payable to the widow of the
24 deceased was \$8,700-some odd dollars?

25 A Yes, in addition to the life insurance

1 mcsr

2 proceeds.

3 Q Can you tell us, please, how you arrived
4 at such a figure?

5 A Yes. Our interpretation was that the only
6 place we could look to determine or the primary place
7 to look to determine what the death benefit is was in
8 the prototype trust agreement section, primarily Article
9 4, and look at Section 4.04 and 4.06. 4.04 tell us
10 what the monthly retirement benefits should be. 4.06
11 tells us that the death benefit should be 100 times
12 the anticipated monthly retirement benefit. If we look
13 back to the adoption agreement, which is Item 4 on
14 Page 2 of the adoption agreement, which is at 4A, the
15 box that is checked, this tells us and would also be
16 our understanding that this defines what compensation
17 is. That is when we look to see what the compensation
18 should be, whether it should include bonuses, overtime,
19 et cetera. This section tells us here how you determine
20 what an annual compensation is. From there we then
21 go back to the trust itself which tells us how we
22 use that compensation to determine, one, what the
23 retirement benefit shall be, and then the only place
24 we can find out what the death benefit should be is
25 a function of what the person's anticipated retirement

1 benefit is to be so that what we do is develop what
2 is known as a rolling average. That is, since we
3 know we want to work with five years, each year we drop
4 off a year and add a new year, so this is known as the
5 developing of a five-year rolling average, and that
6 death benefit is adjusted once a year based on this
7 new five-year average that is developed, and that had
8 been our interpretation and that is the way, in fact,
9 we administer our plan, which is why we developed, I
10 believe it was, a 1,087 retirement benefit and therefore
11 108,700 death benefit minus the 17,000 that was paid
12 by Manhattan Insurance, leaving the 81,700 which we
13 felt was the amount that should be paid out from the
14 trust.
15

16 MR. ROITMAN: I have no further questions.

17 CROSS-EXAMINATION

18 BY MR. ENGLANDER:

19 Q Mr. Fishman, you say you used the five-year
20 average in Mr. Kandell's earnings?

21 A Yes.

22 Q What years?

23 A If I can get my file I'll tell you which
24 years. 1971, 1972, 1973, 1974 and 1975. I'm talking
25 fiscal year now. By the way, let me establish what

1 numbers I'm talking about. The fiscal year end
2 February, February of every year for this corporation,
3 as I understand.
4

5 THE COURT: When you say 1975 --

6 THE WITNESS: When I say 1975, I mean fiscal
7 year ending February 28, 1975.

8 Q But you were using the income of the par-
9 ticipants, were you not, sir?

10 A For the fiscal year involved, yes.

11 Q When the fiscal year ended this particular
12 participant was no longer in this world, was he?

13 A That is correct.

14 Q So he wasn't earning anything, is that right?

15 A That is correct.

16 Q But nevertheless you averaged it as if he
17 was earning a salary; is that correct?

18 A Even though he didn't complete the year,
19 yes, that is correct.

20 May I add that we would average it for the
21 five years at that time on the assumption that he had
22 not completed that full year and we thought maybe that
23 wouldn't be fair. We averaged the prior five full
24 years and we found that the number came out less, so
25 we used the final five years which was a higher average

1 mcsr

2 so it meant a higher death benefit.

3 Q How long was the participant in the pension
4 plan?

5 A It was since its inception, which was since
6 the beginning of the plan.

7 Q Will you please tell us when the plan was
8 adopted?

9 A November 15, 1971.

10 Q That is when the plan was adopted, but it
11 didn't go into effect until the policy was obtained;
12 isn't that a fact?

13 A I don't believe that is a fact, no. That is
14 when the plan was adopted and that is effective date
15 of the plan.

16 Q Mr. Fishman, you were involved in trying to
17 obtain the insurance policy, were you not?

18 A Not me personally, our firm.

19 Q When it was adopted, was that the time you
20 applied for the Guardian Life Insurance policy?

21 A Either sometime before then or -- it may be
22 earlier in 1971 or around that time, yes.

23 Q And Mr. Kandell was rejected by the Guardian
24 Life; is that correct?

25 A I'm not sure. He was either rejected or

1 found to be so rated that he was unacceptable to the
2 insurance company.
3

4 Q Whereupon you began looking for another
5 company to insure him?

6 A Yes, that was obtained, that is right.

7 Q And that policy was obtained in May 1972.

8 A It sounds right. It may have been.

9 Q And the plan went into effect at the time
10 when the policy was obtained in May of 1972?

11 A No, that is not so. The plan went into
12 effect in November 1971. Mr. Kandell, for example, may
13 have been found to be totally uninsurable, in which case
14 there would have been no policy, but the plan still
15 would have been in effect November of 1971. Do you
16 follow me? The plan is a retirement plan. The insurance
17 is incidental to the main thrust of the plan, which is
18 to provide retirement benefits. The insurance was
19 an incidental benefit which may or may not be, you
20 know, applicable. If someone is uninsurable there is
21 no insurance, but there is still retirement, which is
22 designed to accumulate money for retirement.

23 Q Does the plan call for salary at November
24 15, 1974, not the fiscal year, and should not the
25 administration call for salary on the effective date,

1 not the fiscal year of the corporation?

2 A Let me just see -- no, the plan doesn't,
3 not the plan itself, unless you can show me -- whether it
4 be fiscal year or calendar year, the plan is silent on
5 that.
6

7 Q It is silent, but you took it on the basis
8 of fiscal year?

9 A Yes.

10 Q And that benefits the remaining participants?

11 A I don't know that that is so.

12 Q Whatever moneys the widow doesn't get that
13 which remains in the fund and increases the value of
14 the auxiliary fund for the benefit of the remaining
15 participants; is that not a fact?

16 A That is correct.

17 Q If you were taking the actual earnings as
18 of November 15, 1974 --

19 A You mean for that prior year?

20 Q Right.

21 A Which year are you talking about, the
22 calendar year or November 15, for the prior November
23 15 or which year?

24 Q I'm talking about the calendar year, not the
25 fiscal year.

mcsr

1
2 A The calendar year which ended a month after
3 he died.

4 THE COURT: When did this man die?

5 MR. ENGLANDER: December 9, 1974.

6 THE COURT: What has November 15 got to do
7 with it?

8 MR. ENGLANDER: That was the --

9 THE WITNESS: The anniversary date of the
10 plan.

11 MR. ENGLANDER: The anniversary date of the
12 plan.

13 THE WITNESS: What are you suggesting?
14 I'm sorry.

15 Q I'm suggesting that you took a date and
16 fiscal year rather than a calendar year arbitrarily
17 without any provision in the contract to that effect,
18 which benefits the remaining participants.

19 A May I reply to that that we did that for
20 four years prior to the time he died, not knowing that
21 he was going to die or when he was going to die.
22 We had used fiscal year earnings. We didn't change
23 the fiscal year earnings to make our final calculation.
24 We had always used fiscal year earnings and therefor
25 it seemed appropriate to complete fiscal year ends,

mcsr

Fishman - cross

1
2 but if you said to me we changed to a different basis
3 so that we come out with a lower number, then I would
4 agree that would not be a nice thing to do. But, after
5 all, we had always used fiscal year earnings, so that we
6 had not changed. We had always used fiscal year earnings.
7 We didn't know when he was going to die.

8 Q When did you use fiscal year earnings?

9 A From the inception of the plan, according to
10 my records. We have always used the fiscal year
11 ending. The reason we did is because we always did
12 what we call a late review on this plan. In other
13 words, the plan anniversary was November 15, but the
14 time we get around to collecting, to finding out what
15 the actual salaries were, it ran into about February,
16 March, so that we had the full fiscal year earnings
17 and since this was a small company -- after all there
18 are only two participants in the plan -- we usually
19 reviewed at the end of the -- we did in the past --
20 right beyond February 28th for the anniversary of
21 November 15 preceding the anniversary date. We were
22 completely consistent on the method with which we did
23 this final calculation.

24 Q Under the prototype plan, Section 4.05 --

25 A The adoption agreement?

1
2 Q No, the prototype.

3 A Yes.

4 Q Approximately sixty days prior to each anni-
5 versary the trustee shall review the participant's
6 compensation that is called for; right?

7 A Yes, that is correct.

8 Q Would the participants have been entitled
9 to an increase as of November 15 and not ascertained the
10 fact until February 28 in accordance with this section?

11 A He would have gotten an increase, but we
12 would not have finished the administrative work until
13 several months later. For example, in this case the
14 man died, Mr. Kandell died, with \$100,000 of life
15 insurance, whereas he is entitled to \$100,807, which is
16 why we are sitting here, which is why we determined
17 that he should be paid out an additional eighty-seven
18 from the fund. If the man died before we made that
19 final evaluation additional moneys would have had to
20 be paid out of the fund. Am I answering your question?

21 Q I don't think you are.

22 Q Maybe you can explain it better, because
23 I'm not sure what you are driving at.

24 THE COURT: How much longer do you figure
25 you'll be?

MR. ENGLANDER: Only about another five minutes.

THE COURT: Anything further?

MR. ROITMAN: No.

THE COURT: All right.

MR. ENGLANDER: I might have a few minutes' rebuttal, but that is all, not long.

THE COURT: I think maybe we ought to take a break and go into chambers with this criminal case and come back.

MR. ENGLANDER: All right, thank you.

[Recess.]

Q Mr. Fishman, before the interruption I understood you to say that you were reviewing the compensation of the participants as of the fiscal year; is that right?

A That is correct.

Q Whose fiscal year was it?

A The corporation's fiscal year. The corporation, Raydell Publishing and Distributing Company.

Q Now, under Section 4.05 of the plan, could you tell us what date you were supposed to use as --

A Do you want me to read this provision?

Q I'm asking you. You don't have to read it.

A Let me read it to myself.

I don't see -- it doesn't tell you which

1
2 period, as I mentioned before. It says to review it.
3 It doesn't say what period. It says "Approximately 60
4 days prior to each anniversary date the trustee shall
5 review the compensation of all participants. If the
6 compensation of a participant as of such anniversary
7 date" --

8 Q Isn't it referring to anniversary date and
9 the note to the fiscal year of the particular company?

10 A They are talking about when you do the
11 review, not what period of compensation to use.

12 Q What do you mean by "such anniversary date"?
13 What do you refer to there?

14 A As such anniversary date, but it is in the
15 middle of the sentence.

16 Q You just put it in for the fun of it; is
17 that correct?

18 A No. You could take those four words out of
19 context.

20 Q It doesn't refer to the fiscal period?

21 A It doesn't refer to any period. It refers
22 to when you do it, review it. It doesn't refer to
23 what period of compensation you should use.

24 Q Going to 4.06, that deals with pre-retirement
25 death benefits; right?

1

2

A That is correct.

3

Q And that refers then, to 100 times the

4

anticipated monthly retirement benefit; is that right?

5

A Yes. No, excuse me. That really is for

6

a fully insured plan. It refers to an adoption agreement

7

for the death benefit on this type of plan.

8

Q And the adoption agreement, Section 10,

9

which you prepared refers to --

10

A 100 times, correct.

11

Q The death benefits under a policy shall be

12

100 times the anticipated monthly retirement benefit

13

under the plan?

14

A Yes.

15

Q Then it says "See amendment"?

16

A By the "see amendment", that was not part

17

of the original trust. That was a note we made for

18

our files recently to refer us to the amendment.

19

Q But there was an amendment; is that right?

20

A That is correct.

21

THE COURT: That word was not part of the

22

contract?

23

THE WITNESS: No, your Honor.

24

Q But there was an amendment; is that correct?

25

A That is correct.

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Q And the amendment is a part of the contract?

A If it is an amendment to the contract.

Q Now, the amendment was not written to substitute the language instead of the language as I just read to you?

A Which part of the amendment are you talking about?

Q I'm talking about an amendment to Section 10, 4.

A The item No. 4 in the amendment, is that what you are referring to?

Q Yes.

A Yes.

Q It completely eliminates Section 10; is that correct?

A I'm not sure about that.

Q Let's see how it reads, Mr. Fishman. Did that benefit, the death benefit set forth in Item 10, that is the item I'm referring to in the adoption agreement "is amended to read as follows." It doesn't say "to be added," does it?

A No, sir.

Q It doesn't say in any way "to read as follows"?

A That is correct.

1
2 Q So therefore the printed part of Section 10
3 is completely eliminated?

4 MR. ROITMAN: Objection, your Honor.

5 A That is a legal opinion, I guess, but I guess
6 so.

7 Q You guess so?

8 A I'm not sure.

9 Q It doesn't refer to any anticipated monthly
10 retirement? The language there doesn't refer to that,
11 does it?

12 A It does refer to --

13 Q Will you read to me where it says "monthly
14 retirement ?

15 A Do you want me to read it out loud?

16 Q Point out to his Honor where in the amendment
17 there is the language contained "anticipated monthly
18 retirement benefit"?

19 A It doesn't.

20 Q It does not.

21 MR. ENGLANDER: That is all.

22 REDIRECT EXAMINATION

23 BY MR. ROITMAN:

24 Q As you said, you are not an attorney, but
25 I want to get this straight. Again to direct your

1 mcsr Fishman - cross 41
2 attention to Paragraph No. 10 of the adoption agreement
3 that reads or defines the benefit plan, does it not
4 by stating "The death benefit under policy shall be
5 100 times the anticipated monthly retirement benefit
6 under the plan"?

7 A That is correct.

8 Q And then it refers to the amendment and that
9 is contained in the paragraph numbered 4 of the
10 amendment?

11 A That is correct.

12 Q And that states "The death benefit as set
13 forth in Item of the adoption agreement is amended to
14 read as follows"?

15 A That is what it says.

16 Q Mr. Englander asks you if the amendment
17 would serve to eliminate the provisions of Paragraph
18 10. Do you think that an answer of yes is proper now
19 but doesn't it expand rather than eliminate?

20 MR. ENGLANDER: Objection.

21 A I can't answer that. I really am not sure.
22 I think I'm getting a little lost in terminology. It
23 obviously refers to that paragraph in the adoption
24 agreement, but does not refer to the trust agreement,
25 Item 4, 4.06 and 4.04, which I felt were the keypoints

1 mcsr

Fishman - cross

2 to look at. It modifies , I presume, or don't know
3 if it modifies or deletes, but it refers to that item
4 Item 10 in the adoption agreement.

5 Q Would you read the intended portion of
6 Paragraph No. 4 and interpret in layman's language what
7 the thrust of that meeting is?

8 A Yes.

9 "The death benefit under this plan shall be
10 the full amount of any death benefit payable under a
11 policy plus the deceased participant's actuarially
12 adjusted portion of the auxiliary investment fund. In
13 no event shall the death benefit be greater than would
14 be provided if this were a fully insured plan."

15 Let me start off by saying that the last
16 sentence, in no event shall it be greater if it was
17 a fully insured plan, the maximum in a fully insured
18 plan would be 100 times the monthly retirement benefit
19 or the reserve of a retirement income policy. We have
20 computed that in this particular case at this man's
21 age the reserve would not have been greater than 100
22 times, so that therefore the maximum is 100 times the
23 monthly retirement benefit.

24 The interpretation that I would make, my
25 understanding, in other words, is that we would supplement

1 mcsr

Fishman - recross

2 any life insurance to bring the benefit up to 100 times
3 the unpaid monthly retirement benefit.

4 MR. ROITMAN: Thank you.

5 RECROSS-EXAMINATION

6 BY MR. ENGLANDER:

7 Q There is no disagreement about the maximum
8 that he would be entitled to would be 100 times, no
9 disagreement on that; is that correct?

10 A Not as far as I can see.

11 Q What I'm asking you is this: You prepared
12 the amendment, did you not, sir?

13 A No, I did not prepare the amendment.

14 Q Your company prepared the amendment?

15 A An attorney, Mr. Leonard Fisher prepared
16 the amendment.

17 Q I confused Fisher with Fishman. I'm sorry.
18 I apologize.

19 The amendment substituted the language
20 in Section 10; is that correct?

21 THE COURT: I see that.

22 MR. ENGLANDER: That is all. No further
23 questions.

24 THE COURT: Any rebuttal?

25 MR. ENGLANDER: No rebuttal.

mcsr

1
2 THE COURT: Mr. Roitman, I suppose you are
3 going to order the minutes in this case?

4 I don't know why you can't agree among
5 yourselves as to what that means.

6 MR. ENGLANDER: We'll order the minutes.

7 THE COURT: I would like each of you to
8 put in writing, with the help of your experts, exactly
9 what your position is.

10 MR. ENGLANDER: We don't need the minutes.

11 THE COURT: It is up to you.

12 MR. ROITMAN: Thank you, your Honor.

13 I guess we will agree on a date.

14 THE COURT: I want it reasonably quick.

15 MR. ROITMAN: Could we have the second week
16 in July?

17 THE COURT: All right.

18 - - -

19

20

21

22

23

24

25

Plaintiff's Exhibit 1

51a

1 101 Washington Ave., Albany, N.Y. 12210
2 68 Sewall St., Augusta, Maine 04330
3 224 Federal Bldg., Boston, Mass. 02203
4 P.O. Box 291, Brooklyn, N.Y. 11202

5 111 West Main Street, Buffalo, N.Y. 14202
6 21 Elmwood Ave., Burlington, Vt. 05401
7 450 Main St., Hartford, Conn. 06115

8 P.O. Box 3103, New York, N.Y. 10008
9 80 Daniel St., Portsmouth, N.H. 03801
10 130 Broadway, Providence, R.I. 02903

Department of the Treasury

District Director
Internal Revenue Service

Date:

In reply refer to:

Jan. 30, 1973

Au: F:001:RS

Address any reply to DISTRICT DIRECTOR at office No. 8



BEST COPY AVAILABLE

Raydell Publishing & Distributing Corp.
311 West 43rd St.
New York, NY 10036

Name of Plan: Raydell Publishing & Distributing Corporation Employees Pension Plan
Dates: Adopted 11/15/71 Amended 11/15/71

Gentlemen:

Based on information supplied, we have determined that this plan, with any amendments, as shown above, is qualified under section 401 or 405 of the Internal Revenue Code.

Continued qualification of the plan will depend on its effect in operation as well as its present form. (See section 1.401-1(b)(3) of the Income Tax Regulations.)

Employer contributions under the plan are deductible in accordance with the conditions and limitations of section 404 of the Code. If contributions are deducted, you must file Form 2950 (Form 2950SE if the plan includes self-employed individuals) and any information required under section 1.404(a)-2 of the regulations.

This letter relates only to the status of your plan under the Internal Revenue Code. It is not a determination regarding the effect of other Federal or local statutes.

Please notify us if you terminate this plan.

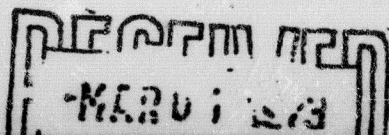
For guidance in ascertaining whether your plan falls within the general wage and salary standards, see the regulations issued by the Pay Board under the authority of the Economic Stabilization Act of 1970, as amended. We will be pleased to entertain any questions which you may have regarding the Economic Stabilization Program.

cc: Mr. Leonard I. Fischer
919 Third Ave.
New York, NY 10022

Very truly yours,

Edward H. Gray
District Director

KEEP AS A PERMANENT RECORD



Plaintiff's Exhibit 1 52 a
RAYDELL PUBLISHING & DISTRIBUTING CORP. AMENDMENTS
TO THE GUARDIAN LIFE VARIABLE FORM PROTOTYPE PENSION
PLAN AND TRUST AGREEMENT

1. Section 4.07 is hereby modified to read as follows:

"4.01...The amount of insurance for a Participant who is found to be insurable only at substandard rates shall in all respects be similar to that for a Participant who is insurable at standard rates."

2. Section 4.08 is hereby modified by deleting the phrase "or who elects not to pay the additional premium as stated in 4.07" therefrom.

3. The pension formula as set forth in item 6. I of the Adoption Agreement is amended to read as follows:

"The amount of monthly Retirement Benefit on the normal form initially to be provided shall be 45% of the Participant's monthly Compensation.

If a Participant will have less than 20 years of participation in the Plan at his Normal Retirement Date, the Benefit shall be reduced by one-twentieth (1/20th) for each full year of participation less than twenty (20)."

4. The death benefit as set forth in item 10 of the Adoption Agreement is amended to read as follows:

"The death benefit under this Plan shall be the full amount of any death benefit payable under a Policy plus the deceased Participant's actuarially adjusted portion of the Auxiliary Investment Fund. In no event shall the death benefit be greater than would be provided if this was a Fully Insured Plan."

5. ARTICLE VII of the Guardian Life Variable Form Prototype Pension Plan and Trust Agreement is amended by adding the following:

"7.05...The Trustees, solely at their option, may grant all Participants the right to contribute to the Auxiliary Investment Fund a sum not to exceed ten (10%) per cent of the total amount actually paid by the Employer to such Participant for service rendered since becoming a Participant."

"7.06...At such time as the Trustees may determine that Participant contributions will be permitted, the Trustee shall promulgate specific rules and regulations governing all aspects of the voluntary contribution, and any Participant electing to make such contributions shall complete and sign the form provided by the Trustee for such purposes, agreeing to all the terms and conditions set forth by the Trustees as a condition for eligibility to make such contributions."

"7.07...If the contributing Participant shall, during any Plan Year, have the right pursuant to the rules and regulations promulgated under the provisions of Paragraph 7.07, to withdraw his own contributions or any part thereof, the maximum amount of any such withdrawal shall be the total contributions of such Participant or the portion of his benefits attributable to such contributions; if less. He shall at all times be one hundred (100%) per cent vested in any increment attributable to his own contributions, notwithstanding any other provisions of the Plan, and such amount shall remain in the Auxiliary Investment Fund and be distributable in accordance with Paragraph 7.08 hereof."

"7.08...Notwithstanding any other provisions of the Plan, the contributing Participant shall be entitled to one hundred (100%) per cent of that portion of his benefits attributable to his own contributions upon termination of employment for any reason. Distribution of such amount shall be made in a lump sum payment, the Participant may elect to have such amount distributed to him in the same manner as selected for the distribution of the portion of his benefits attributable to the Employer's contributions."

6. The Employer and the Trustees specified in the Adoption Agreement hereby agree to the above amendments to the Guardian Life Variable Form Prototype Pension Plan and Trust Agreement.

54 a
Plaintiff's Exhibit 1

RAYDELL PUBLISHING & DISTRIBUTING CORP.

BY: _____
President

Trustee

Trustee

NAME OF EMPLOYER RAYFELL PUBLISHING & DISTRIBUTING CORPORATIONADDRESS 311 West 43rd Street(Number and Street)
New York, N. Y.NAME OF PLAN RAYFELL PUBLISHING & DISTRIBUTING CORPORATION
EMPLOYEES PENSION PLAN

(City)

(State and Zip Code)

NAMES OF TRUSTEES Irving KandellRaymond LussaADDRESS OF TRUSTEES 311 West 43rd Street(Number and Street)
New York, N. Y.

(City)

(State and Zip Code)

INTRODUCTION

This Adoption Agreement and the provisions of The Guardian Life Variable Form Prototype Pension Plan and Trust Agreement of which this Agreement is a part, is hereby adopted by the Employer for the benefit of his Employees and their Beneficiaries.

Complete (a) or (b) below:

(a) If this Adoption Agreement is part of the original adoption of the Plan, check here ☒

(b) If this Adoption Agreement is an amendment of a previously adopted Plan as provided in Section 9.02 (and following), check here ☐

In the case of (b) complete only those items that are to be amended. Such completed items are numbers _____ (indicate numbers of amended Sections).

The Employer makes the following elections as a part of the Pension Plan:

DEFINITIONS AND ELECTIONS

INSTRUCTIONS

Check one or more applicable boxes.

Insert date.

Complete all items. Insert "None" wherever not applicable.

Insert such Age between 20 and 30, or state "None".

Insert from zero to five years.

Insert the Age between 50 and 70, or state "None".

Insert "None" or "Integration Level".

"Integration Level" may be used only if Retirement Benefit 6-II or 6-V is selected & the first % is zero."

1. EMPLOYEE shall mean each person who is ☒ salaried ☐ hourly
☐ covered by a collective bargaining agreement ☐ not covered
by a collective bargaining agreement, and is regularly employed
by the Employer on a full-time basis excluding any person whose
customary employment is for not more than twenty hours per
week, or for not more than five months in any calendar year.

2. EFFECTIVE DATE of this Plan [if (a) of the Introduction is checked]
or of the Amendment [if (b) of the Introduction is checked] shall
be November 15, 1971

3. REQUIREMENTS FOR ELIGIBILITY FOR PARTICIPATION IN THE
PLAN.

a. For persons who are Employees on the Effective Date:

(i) Minimum Age 25

(ii) Minimum Current Service 4 Years

(iii) Maximum Age 55

(iv) Minimum Compensation None

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PLEASE OBSERVE RESTRICTIONS UNDER SECTION 2.02 OF THE PLAN.

Insert same as (a)(i), or higher Age within the limits stated in (a)(i).

Insert same as (a)(ii), or higher number within the limits stated in (a)(ii).

Insert same as (a)(iii), or a lower Age within the limits stated in (a)(iii).

Insert same as (a)(iv).

Item 4(A) may be used only if Plan is not integrated with Social Security (item 6(A) is checked).

Check box if bonus and/or commissions to be included.

Item 4(B) must be used if Plan is integrated with Social Security (item 6(B) is checked).

Check box and insert Age not below 55 or above 70. If Plan is integrated with Social Security (item 6(B) is checked), this must be Age 65.

Insert N/A if not applicable, otherwise insert number of years between 5 and 15.

Insert N/A if not applicable, otherwise insert Age not below 65 or above 75.

Check box A if Plan is not integrated, or box B if it is integrated with Social Security benefits. In the latter case, check box (i) if six step table is to be used for integration level; box (ii) if a level amount is to be used and insert such level amount; or box (iii) for Money Purchase Plans—if the Social Security maximum taxable wage is to be used.

b. For persons who become Employees after the Effective Date:

(i) Minimum Age 25

(ii) Minimum Current Service 4 Years

(iii) Maximum Age 55

(iv) Minimum Compensation None

4. COMPENSATION shall mean

☒ (A) a Participant's basic annual rate of compensation, excluding payment for overtime, bonuses, and commissions, unless otherwise stated below. Monthly Compensation is one-twelfth of the annual rate.

☒ Include bonuses in Compensation.

☐ Include commissions in Compensation, either of these non-recurring items at the average annual rate over a three year period (or full employment if less than three years) to the date when benefits are determined.

☐ (B) a Participant's total wages (including compensation for overtime, bonuses, commissions, and other non-recurring items) received by the Employee over a period of twelve consecutive months ending on the last day of the month next preceding by two months the date as of which Compensation is determined.

5. NORMAL RETIREMENT DATE shall be

☐ first day of month following Participant's _____th birthday.

☐ subject to a minimum of _____ years of participation.

☒ not later than the Anniversary Date nearest the Participant's Age 65

6. RETIREMENT BENEFITS

☒ (A) The Plan will not be integrated with Social Security. (CHECK FORMULA UNDER I OR IV BELOW.)

☐ (B) The Plan shall be integrated with Social Security. (CHECK FORMULA UNDER II, III OR V BELOW.)

Each Participant's Integration Level shall be:

☐ (i) the covered compensation based on the year of birth of each Participant, in the following table:

Year of Birth	Integration Level
1903 or earlier	\$4,800
1904 - 1906	5,400
1907 - 1913	6,000
1914 - 1928	6,600
1929 - 1935	7,200
1936 or later	7,800

Insert an amount between \$4,800 and \$15,000; observe instructions under II and V below.

CHECK ONLY ONE OF THE BOXES I, II, III, IV OR V.

Use only if 6A is checked.

Insert percentage, not below 10% or above 70% if description applies.

Insert N/A, or not less than 10, or not more than 35.

Use only if 6B is checked.

Insert % between zero and 40.

This percentage must not exceed the first percentage by more than 24% for a Plan with 10 C&L pension or 26 $\frac{2}{3}$ % for life only pension, provided (B)(i) is selected or the flat amount inserted under (B)(ii) does not exceed the lowest amount in the table under (B)(i) for any individual who is or may become a Participant. If the flat amount inserted under (B)(ii) does exceed such lowest amount, the above quoted maximum percentages of 24% and 26 $\frac{2}{3}$ %, respectively, must be reduced in the ratio that such lowest amount bears to the flat amount inserted under (B)(ii). *Example:* (a) The oldest individual who is or may become a Participant was born in 1904. The amount inserted in (B)(i) is \$5,400. Thus it does not require a reduction in the maximum percentages. (b) The amount inserted in (B)(ii) is \$10,000. The maximum percentage must be reduced in the ratio of \$5,400 to \$10,000, i.e., by 54%, to result in 12.9% and 14.4%, respectively.

Use only if 6B is checked.

Insert percentages. First may be any % up to 75%. Second must not exceed 66 $\frac{2}{3}$ % for a Plan with 10 C&L pension or 74% for life only pension.

Insert N/A, or not less than 10, or not more than 35.

Use only if 6A is checked.

Insert percentage, not less than 5, not more than 25.

☐ (ii) a flat amount of \$_____

☐ (iii) This may be used for Money Purchase Plans only: The taxable wage base with respect to any year, i.e. the maximum amount of earnings which may be considered wages for such year for Social Security taxability.

☒ I. NON-INTEGRATED DEFINED BENEFIT

The amount of monthly Retirement Benefit on the normal form initially to be provided shall be 45% of the Participant's monthly Compensation.

If a Participant has less than 20 years service to his Normal Retirement Date (minimum service for full benefit) the Benefit shall be reduced by a fraction, the numerator of which is 1, and the denominator the minimum number stated above, for each full year of service less than such minimum.

☐ II. INTEGRATED DEFINED BENEFIT STEP-RATE OR EXCESS PLAN

The amount of monthly Retirement Benefit on the normal form initially to be provided shall be _____% of the Participant's monthly Compensation up to 1/12 of his Integration Level, plus _____% of such monthly Compensation in excess of 1/12 of this Integration Level. The additional Benefit provided by the difference in percentages above and below the Integration Level as it applies to the Compensation above the Integration Level shall be reduced by 1/15 for each full year of service less than 15 years.

☐ III. INTEGRATED DEFINED BENEFIT OFFSET PLAN

The amount of monthly Retirement Benefit on the normal form initially to be provided shall be _____% of the Participant's monthly Compensation less _____% of the monthly Primary Social Security benefit for males in accordance with the Social Security benefit schedule in 1968.

If a Participant has less than _____ years service to his Normal Retirement Date (minimum service for full benefit) the Benefit shall be reduced by a fraction, the numerator of which is 1, and the denominator the minimum number stated above, for each full year of service less than such minimum.

☐ IV. NON-INTEGRATED MONEY PURCHASE PLAN

The amount of the monthly Retirement Benefit on the normal form initially to be provided shall be that amount which can be provided by an annual contribution equal to _____% of the Participant's annual Compensation.

INSTRUCTION:

Use only if 6B is checked.

Insert percentage between zero and 25.

This percentage must not exceed the first percentage by more than 6%, provided (B)(i) or (B)(iii) is selected or the flat amount inserted under (B)(iii) does not exceed the taxable wage base with respect to any year. If the flat amount inserted under (B)(ii) does exceed the taxable wage base, the 6% stated above must be reduced in the ratio that the taxable wage bears to the flat amount inserted under (B)(ii).

Check if applies.

Insert N/A or a number which must be \$20 if Minimum Compensation under (3)(a)(iv) is "Integration Level". Otherwise any amount between \$20 and \$100.

Insert N/A or any amount between \$100 and \$3,000.

Check if applies.

Insert N/A or a number which must be \$48 if Minimum Compensation under (3)(a)(iv) is "Integration Level". Otherwise any amount between \$48 and \$300.

Insert N/A or any amount between \$300 and \$15,000.

Check if applies.
(10 C&L pension)

Check if applies.
(life only pension)

Check applicable box.

Check applicable box. Factor to be between $33\frac{1}{3}$ and 100.

This percentage must be at least 20% and must be less than 50%.

☐ V. INTEGRATED MONEY PURCHASE PLAN

The amount of the monthly Retirement Benefit on the normal form initially to be provided by an annual contribution equal to _____% of the Participant's annual Compensation up to his Integration Level plus _____% of such Compensation in excess of his Integration Level.

7. MAXIMUM AND MINIMUM

- ☐ (A) Defined Benefit Plan: No monthly Retirement Benefit on the normal form, after appropriate reduction as required under the Plan, shall be:

less than \$ _____

greater than \$ _____

- ☐ (B) Money Purchase Plan: No annual contribution shall be:

less than \$ _____

greater than \$ _____

8. NORMAL FORM OF RETIREMENT BENEFIT shall mean that the Retirement Benefit will be payable as follows:

- ☒ Payable for life of the Retired Participant and, if 120 monthly installments have not been paid prior to his death, continuing thereafter to his Beneficiary until the total number of installments paid to him and his Beneficiary equals 120.

- ☐ Payable solely for the life of the Retired Participant. No further payments shall be made after his death.

9. METHOD OF FUNDING shall be as indicated below:

- ☐ Fully Insured Plan: The Benefits shall be funded solely by Policies acquired on the life of each Participant.

- ☒ Combination Plan: The Benefits shall be funded by the purchase of Ordinary Life type Policies and contributions to an Auxiliary Investment Fund.

10. PRE-RETIREMENT DEATH BENEFIT-COMBINATION PLAN.

- ☒ Defined Benefit Plan: The death benefit under a Policy shall be 1.20 times the anticipated monthly Retirement Benefit under the Plan. - See Amend

- ☐ Money Purchase Plan: The contribution for each Participant shall be used as follows:

_____ % of the annual contribution shall be used to purchase Ordinary Life insurance, the balance shall be invested in the Auxiliary Investment Fund.

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Plaintiff's Exhibit 1

Check applicable boxes.

Insert percentages if applicable. (First not over 6%, second not over 50%.)

Check if applies.

Check (a) or (b)

Insert 1/5, 1/10, 1/15 or 1/20

Check if applies.

Check (a), (b) or (c).

Insert 1/5, 1/10, 1/15 or 1/20.

Insert 1/5, 1/10, 1/15 or 1/20.

Use this space for amendments to the Prototype Plan document. Refer to specific section to be amended. If none, so indicate.

NOTE: If any amendments to the Plan and Trust Agreement are stated, such amendment will cancel the pre-approved prototype status of the Plan and will cause the Plan to be considered by Internal Revenue Service in its entirety as a Plan individually drawn and submitted by the Employer for approval. (See Section 9.03 of Plan.)

If none, so indicate.

11. CONTRIBUTIONS BY PARTICIPANTS.

☐ Not required.

☐ The annual amount of each Participant's contribution is to be _____% of his annual Compensation, but not to exceed _____% of the total contribution required for his Benefits.

12. TERMINATION OF EMPLOYMENT AND VESTING.

☐ (A) Fully Insured Plans.

☐ (a) The fraction of vesting shall be _____ for each full year of participation, up to 100%.

☐ (b) The fraction shall be 100% at all times.

☒ (B) Combination Plan.

☐ (a) The fraction of vesting as it applies to Benefits arising from the Auxiliary Investment Fund shall be _____ for each full year of participation, up to 100%; and shall be, as it applies to Benefits arising from the Policies, 100% at all times.

☒ (b) The fraction of vesting shall be 1/5 for each full year of participation, up to 100%; this applies to Benefits arising from both the Policies and the Auxiliary Investment Fund.

☐ (c) The fraction shall be 100% at all times.

13. AMENDMENTS TO PROTOTYPE PENSION PLAN AND TRUST AGREEMENT.

(Insert additional pages if necessary.)

This Adoption Agreement shall take effect when executed by the Employer and the Trustees but not earlier than the Effective Date of the Plan or Amendment to the Plan.

IN WITNESS WHEREOF, the Employer and the Trustees, respectively, have caused these presents to be signed by their duly authorized officers and have caused their respective corporate seals where required to be hereunto affixed, the day and year written below.

ATTEST:

Seal

Title

Date

ATTEST:

CORPORATE

By:

Employer

Title

Title

Trustee

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Plaintiff's Exhibit 1

The
Citation
Life
Variable
Form
Prototype
Pension
Plan
and
Trust
Agreement

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Plaintiff's Exhibit 1

US Treasury Department

Internal Revenue Service
Washington, DC 20224

Date:

OCT 27 1969

In reply refer to:

T:MS:PT-BLL



► The Guardian Life Insurance Company
of America
201 Park Avenue South
New York, New York 10003

Gentlemen:

In Re: The Guardian Life Variable Form
Prototype Pension Plan and Trust
Agreement

Plan Serial Number: 1691473

Pension Plan: ☒

Profit-Sharing Plan: ☐

In our opinion the above variable form of plan and the related trust/custodial account is acceptable under section 401(a) of the Internal Revenue Code for use by employers who supplement it with provisions to make a qualified plan for the benefit of their employees, other than self-employed individuals.

Our opinion as to the acceptability of the form of plan does not constitute a ruling or determination of the qualification of an employer's plan under section 401(a) of the Code, or of the exemption of the related trust/custodial account under section 501(a). Should an adopting employer want a determination, he must file Form 4462, with the supplemental provisions, with his District Director of Internal Revenue.

You must furnish a copy of this letter to each employer who adopts the plan. You are also required to send a copy of the approved form of plan and related documents to each District Director in whose jurisdiction there are adopting employers.

This opinion relates only to the acceptability of the form of plan under the Internal Revenue Code. It is not an opinion of the effect of other Federal or local statutes.

Please notify us if you terminate the form of plan and related trust/custodial account.

Sincerely yours,

Chief, Pension Trust Branch

SAVE AS A PERMANENT RECORD

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NOTICE

Guardian Life has designed this Prototype Pension Plan and Trust Agreement for the purpose of assisting employers and their legal counsel in the installation of a retirement plan designed to comply with the requirements of Sections 401 and 501 of the Internal Revenue Code of 1954 as amended. This Plan and Trust Agreement has been approved by the Internal Revenue Service as to form, under Number 1691473 in a letter dated October 27, 1969.

An employer may adopt the Guardian Life Variable Form Prototype Pension Plan and Trust Agreement by executing the following Adoption Agreement. Copies of the executed Adoption Agreement must be filed by the employer with the Internal Revenue Service in the district in which the employer has his principal place of business. I.R.S. Form 4462 should be used for this filing.

Each employer must act upon the advice of his own legal counsel in making application for, and adopting this Plan. The factual background of each employer and his employees will determine whether the Plan as adopted complies with Internal Revenue Service Regulations for qualification and favorable tax treatment.

Each employer must realize that neither The Guardian Life Insurance Company of America nor its representative can give legal advice as to the Internal Revenue Code or this form and that the establishment and qualification of a retirement plan and related tax consequences are the sole responsibility of the employer aided by his own legal advisor.

Definitions

The following words and terms, as used in this Plan, shall have the meanings set forth below:

- 1.01 "Plan" shall mean The Guardian Life Variable Form Prototype Pension Plan and Trust Agreement as set forth herein, and as named in the Adoption Agreement.
- 1.02 "Adoption Agreement" shall mean the Adoption Agreement executed by the Employer and the Trustees named therein, attached hereto and made a part hereof as more fully set forth herein.
- 1.03 "Employer" shall mean the employer named in the Adoption Agreement. An Employer's adoption of this Plan shall not imply or include its adoption by affiliated, subsidiary, or any other employers, and each such employer who wishes to do so shall adopt this Plan and establish a separate trust independent of other employers.
- 1.04 "Employee" shall be as defined and selected by the Employer in the Adoption Agreement (see item 1).
- 1.05 "Participant" shall mean an Employee who has satisfied all the eligibility requirements as stated in the Adoption Agreement and who has not declined to fulfill any of the conditions required in 2.04. An eligible Employee who does not wish to become a Participant must sign a waiver notice stating that he has been advised by his Employer that a benefit is made available to him and he so knowing waives his right to such benefit.
- 1.06 "Retired Participant" shall mean a former Participant who has retired under the retirement provisions of this Plan.
- 1.07 "Trustees" shall mean the persons named as trustees in the Adoption Agreement and their duly appointed successors.
- 1.08 "Insurer" shall mean The Guardian Life Insurance Company of America, 201 Park Avenue South, New York, New York 10003.
- 1.09 "Plan Year" shall mean the period of twelve months between two successive Anniversary Dates.
- 1.10 "Effective Date" shall be as stated in the Adoption Agreement (see item 2).
- 1.11 "Anniversary Date" shall mean the Effective Date and each anniversary thereof.
- 1.12 "Age" shall mean an Employee's age at his nearest birthday.
- 1.13 "Policy" shall mean a life insurance or annuity contract issued by the Insurer.
- 1.14 "Beneficiary" shall mean any person, estate, trust or organization entitled to receive any payments under the Plan on the death of a participant.
- 1.15 "Normal Retirement Date" shall mean the date specified in the Adoption Agreement (see item 5).
- 1.16 "Continuous Employment" shall mean continuous and uninterrupted periods of time during which an employee is in the employment of the Employer. Such periods shall include leaves of absence with the approval or at the direction of the Employer, not exceeding two years in duration. Leaves of absence shall be granted for sickness, disability, maternity, death in the family and educational purposes or for other reasons as agreed to by the Employer. All leaves of absence shall be granted on a uniform and nondiscriminatory basis. Such periods shall also include periods of absence in connection with military service during which the Employee's re-employment rights are legally protected. However, an Employee shall not become a Participant during such leaves of absence or during such military service.

An Employee's Continuous Employment shall include his employment by the Employer or with any predecessor thereof which is continuous and without interruption other than for an absence described above. However, if such predecessor was a Partnership or a Sole Proprietorship, service as a partner or sole proprietor shall not be included under "Continuous Employment."
- 1.17 "Compensation" shall be as defined by the Employer in the Adoption Agreement (see item 4).
- 1.18 "Method of Funding" shall be as selected in the Adoption Agreement (see item 9).
- 1.19 "Fully Insured Plan" shall mean a Plan selected by the Employer in the Adoption Agreement, under which full retirement benefits are provided by Policies acquired on the life of each Participant.
- 1.20 "Combination Plan" shall mean a Plan selected by the Employer in the Adoption Agreement under which the Employer shall fund benefits by the purchase of Policies on the lives of Participants and by contributions to be invested as part of an auxiliary investment fund.

Article II

Eligibility and Membership

- 2.01 Each Employee shall be eligible to become a Participant pursuant to the provisions selected by the Employer in the Adoption Agreement (see item 3).
- 2.02 If the eligibility requirements for persons who are Employees on the Effective Date (item 3a of the Adoption Agreement) differ from those for persons who become Employees after the Effective Date (item 3b of the Adoption Agreement) the latter requirements must be such that all Employees on the Effective Date who are officers, shareholders, persons whose principal duties consist of supervising the work of other Employees, or highly compensated Employees would have met the eligibility requirements, if the latter requirements would have been in effect for persons who are Employees on the Effective Date.
- 2.03 Each Employee shall be notified by the Trustees of the existence of the Plan and of its principal provisions. In addition, each Employee shall be advised of his right to participate not later than twenty days prior to the Anniversary Date on which he is first eligible to participate.
- 2.04 To become a Participant, an eligible Employee must execute the required application form or forms. He must make available to the Insurer such information as it may require in connection with the issuance of any Policy on his life. Such Employee must perform all acts required of him within ninety days of the date on which he was notified of his eligibility. If he fails to perform within the required time, he may become a Participant on such later Anniversary Date when he does comply with the above conditions.
- 2.05 In the event a Participant shall cease to be employed by the Employer for any reason whatsoever, other than for an approved absence described in Section 1.16, he shall cease to be a Participant in the Plan. In the event such Participant is re-employed by the Employer, he shall be deemed a new Employee as of the date of his re-employment. Unless the retirement benefits depend upon the number of years of service, and unless the Plan is of a money purchase type, his benefits shall then be reduced by the value of all previous distributions made on account of his prior termination of employment.

Article III

Policies

- 3.01 Benefits under the Plan shall be provided by an Income Endowment type Policy, a Retirement Annuity type Policy, or an Ordinary Life type Policy with an auxiliary investment fund. Such Ordinary Life type Policy shall contain an additional income purchase option in an amount which will, upon exercise of such option and payment to the Insurer of the additional amount specified therein, provide the required amount of pension benefit. Such Policies shall be applied for by the Trustees on a non-discriminatory basis upon applications signed by any one Trustee, and shall provide for level annual premiums. Each Policy shall be a contract between the Trustees and the Insurer.
- 3.02 Each Policy shall provide for the following:
 - (a) Income shall be payable on or after the Participant's retirement date as directed by the Trustees prior to commencement of payment.
 - (b) The right to name and change the designation of Beneficiaries and to select the settlement option shall be exercised by the Trustees, subject, however, to the direction of the Participant. The Participant may be required to execute appropriate documents directing the Trustees as to such provisions.
 - (c) All rights, options and benefits provided by the Policy, or permitted by the Insurer shall be reserved to the Trustees and may be exercised upon signature of any one Trustee. The signature of the Participant shall not be necessary for the exercise of any right except in accordance with the provisions of the Plan.
 - (d) The Policy, when owned by other than the Trustees hereunder, shall not be sold, assigned, discounted or pledged as collateral for a loan or as security for the performance of an obligation or for any other purpose to any person other than the Insurer.
- 3.03 Any dividend payable while the Policy is premium-paying shall be used to reduce subsequent year premiums, except

with respect to a plan using a money purchase type formula, in which event, dividends, if any, will be used to increase the benefits on the contracts under which they arose. Any dividend payable when there is no further premium to be paid by the Trustees shall be used to increase the proceeds of the Policy.

- 3.04 No election shall be made by the Trustees, the effect of which would be to have all or part of a Participant's Retirement Benefit paid only to his designated Beneficiary after his death, if such benefit would otherwise have been payable during the Participant's lifetime. However, subject to the Policy provisions, the Trustees may select a single sum settlement or any optional settlement, except the interest option, available for payment of Retirement Benefits set forth in the Policy. Optional settlements shall be calculated on the basis of the rates (guaranteed or modified) in effect at the time of election for the Policy on the Participant's life. Single sum settlements shall be the cash equivalent of the Benefit due the Participant based on such settlement rates. No election shall be made which provides that such benefits be payable over a period which exceeds
- (a) the life of the Participant or the lives of the Participant and his spouse, or
 - (b) the life expectancy of the Participant or the life expectancies of the Participant and his spouse, calculated as of the end of the taxable year in which a Participant's benefits are required to commence.
- 3.05 All Policies purchased pursuant to the Plan must be purchased in a non-discriminatory manner. All Policies must be on the same plan, bear an issue date coincident with an Anniversary Date, have each premium payment cover the same period, and contain the same features, if any (waiver of premium or accidental death), all of this; unless contrary to the underwriting rules of the Insurer wherein the closest plan in the opinion of the Trustees should be purchased.
- 3.06 If the Plan is a money purchase plan, the aggregate life insurance premiums for each Participant must be less than one-half the aggregate contributions and forfeitures allocated to him at any particular time, without regard to trust earnings, capital gains and losses.

Article IV

Retirement and Death Benefits

- 4.01 Each Participant shall be entitled to receive a Retirement Benefit on his Normal Retirement Date as selected in the Adoption Agreement. All monthly Retirement Benefits shall be computed to the nearest dollar (see item 6).
- 4.02 The minimum and maximum monthly benefit shall be as selected by the Employer in the Adoption Agreement (see item 7).
- 4.03 The monthly benefit shall be paid on the normal form as selected in the Adoption Agreement (see item 8).
- 4.04 The Participant's benefit at his Normal Retirement Date shall be based on the average of his compensation for the highest five (5) consecutive years within a period of ten years preceding the fifth anniversary prior to his Normal Retirement Date.
- 4.05 Approximately 60 days prior to each Anniversary Date, the Trustees shall review the compensation of all Participants. If the Compensation of a Participant as of such Anniversary Date has increased or decreased since the last adjustment of his benefits, or, if there has been no previous adjustment of his benefits since his entry into the Plan, the amount of pension to which he shall be considered entitled shall be increased or reduced in accordance with the formula selected in the Adoption Agreement. However, no such increase or decrease in pension shall be given effect until the anniversary on which such change in compensation shall be sufficient, upon the application of the formula selected in the Adoption Agreement, to cause an increase or decrease in monthly pension of at least \$10.00, or the purchase of a \$1,000 life insurance policy. Notwithstanding the foregoing provisions, there shall be no change in the amount of monthly pension by reason of an increase or decrease in compensation made within five (5) years immediately preceding the Normal Retirement Date of a Participant.
- 4.06 The amount of pre-retirement death benefit for a Participant found by the Insurer to be insurable at standard rates shall be (a) under a Fully Insured Plan: (i) Defined Benefit Plan—100 times the anticipated monthly retirement benefit, or the cash value under the Policy, whichever is greater; (ii) Money Purchase Plan—the death benefit of the Policy purchased by the contribution for each Participant; (b) under a Combination Plan: as stated in the Adoption Agreement (see item 10).
- 4.07 The amount of insurance for a Participant who is found to be insurable only at sub-standard rates shall, as it applies

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to Defined Benefit Plans, in all respects be similar to that described in the Adoption Agreement, if the Participant, in his sole discretion, irrevocably agrees, on the date of the Policy and for the duration of the Policy to pay additional premiums required to obtain the full amount of the death benefits as provided in the Adoption Agreement.

- 4.08 For a Participant who is uninsurable or who elects not to pay the additional premium as stated in 4.07, the Policy to be issued shall be a Retirement Annuity with a death benefit of the greater of the return of premiums or the cash value. If the Method of Funding is a Combination Plan the Retirement Annuity shall be of such amount that can be purchased for an annual premium equal to the sum that would have been used to provide a Policy as described in the Adoption Agreement were the Participant insurable at standard rates.

Retirement

- 5.01 If a Participant shall retire as of his Normal Retirement Date, he shall be fully vested in all Policy values. For money purchase combination plans he will also be fully vested in his individually allocated share of the auxiliary fund. For defined benefit combination plans he will be fully vested in the additional amount required by the Insurer to provide the necessary Retirement Benefit. The Trustees shall take all necessary steps and execute all required documents to have the Insurer pay such Retirement Benefits as are available under the Policies on the life of such Participant and shall release such auxiliary investment funds as are required for this purpose.

- 5.02 A Participant who shall have attained an age of at least sixty (60) years and completed fifteen (15) years of continuous Employment may, with the consent of the Employer, retire prior to his Normal Retirement Date. In granting or denying a request for early retirement, the Employer shall act in a non-discriminatory manner of uniform application to uniformly situated cases. The Trustees shall take all necessary steps and execute all required documents to make the benefit available upon such early retirement.

(A) In case of a Fully Insured Plan, the benefit shall be such as may be provided by the value of the Policies purchased on the Participant's life.

(B) In case of a Combination Plan the following applies:

- (a) Defined Benefit Plan: The benefit shall be such as may be provided on the basis of the guaranteed settlement option rates contained in the Policies purchased on the Participant's life (or their actuarial equivalent) by the sum of the value of such Policies and the Participant's actuarially adjusted allocable portion of the Auxiliary Investment Fund (See Section 13.04 b). In no event however shall the benefit exceed the following maxima:

(i) In Plans other than Integrated Defined Benefit Offset Plans, the benefit to be determined as of the Normal Retirement Date (assuming that until then he continued to receive the same compensation he was receiving on the early retirement date) with the following two adjustments. (1) The benefit shall be multiplied by a fraction the numerator of which is the Participant's number of years of Continuous Employment to the early retirement date, the denominator of which is the number of years of Continuous Employment he would have had as of the Normal Retirement Date. (2) The benefit adjusted under (1) shall be further adjusted by a reduction factor of 1/15 for each year by which the early retirement date precedes the Normal Retirement Date.

(ii) In Integrated Defined Benefit Offset Plans, the benefit to be determined as of the Normal Retirement Date, but the offset determined as the product of (1) and (2), (1) being the primary Social Security benefit to which the Participant would be entitled on the Normal Retirement Date (assuming that until then he continued to receive the same compensation he was receiving on the early retirement date), and (2) being a fraction the numerator of which is the Participant's number of years of Continuous Employment to the early retirement date, the denominator of which is the number of years of Continuous Employment he would have had on the Normal Retirement Date. The benefit so determined shall be adjusted by a reduction factor of 1/15 for each year by which the early retirement date precedes the Normal Retirement Date.

- (b) Money Purchase Plan: The benefit shall be such as may be provided on the early retirement date by the sum of the value of the Policies purchased on the Participant's life and the Participant's allocable portion of the Auxiliary Investment Fund (See Section 13.04 c).

- 5.03 A Participant, after having been certified by the Employer upon competent medical evidence, as having become

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permanently and totally disabled shall be retired immediately provided he is eligible to receive Social Security disability benefits. The disability benefit, however, may be paid pending disposition of the application for Social Security disability benefits. The Trustees shall take all necessary steps and execute all required documents to make the benefit available upon such disability retirement.

(A) In case of a Fully Insured Plan, the Benefit shall be such as may be provided by the value of the Policies purchased on the Participant's life.

(B) In case of a Combination Plan the following applies:

(a) Defined Benefit Plan: The benefit shall be such as may be provided on the basis of the guaranteed settlement option rates contained in the Policies purchased on the Participant's life (or their actuarial equivalent) by the sum of the value of such Policies and the Participant's actuarially adjusted allocable portion of the Auxiliary Investment Fund (See Section 13.04 b). In no event however shall the benefit exceed the following maxima:

(i) In Plans other than Integrated Defined Benefit Offset Plans, the benefit to be determined as of the Normal Retirement Date (assuming that until then he continued to receive the same compensation he was receiving on the disability retirement date) multiplied by the greater of (a) and (b), as follows: (a) seven-tenths; (b) a fraction the numerator of which is the Participant's number of years of Continuous Employment to the disability retirement date, the denominator of which is his number of years of Continuous Employment to the Normal Retirement Date.

(ii) In Integrated Defined Benefit Offset Plans, the benefit to be determined as of the Normal Retirement Date but the offset calculated as 64% of the Social Security disability benefit under the law in effect at the time of the disability retirement.

(b) Money Purchase Plan: The benefit shall be such as may be provided on the disability retirement date by the sum of the value of the Policies purchased on the Participant's life and the Participant's allocable portion of the Auxiliary Investment Fund (See Section 13.04 c).

5.04 If a Participant shall, with the consent of the Employer, remain in its employ after his Normal Retirement Date, no further contributions shall be made for his benefit; and the Trustees shall take whatever steps may be necessary and execute all required documents in order to have the Insurer pay such retirement benefits as are available under any contract or contracts on the life of such Participant and from such auxiliary investment funds as are held on his behalf, and, to the extent permitted by the terms of the respective contracts and the rules of the Insurer, to have payment of such retirement benefits deferred. However, distribution must commence not later than five years after Normal Retirement Date.

5.05 While payments are being made under any Policy, it shall remain subject to the Plan and in the possession of the Trustees, unless the Trustees, in their sole discretion, deliver it to a Retired Participant, with such endorsements and restrictions as may be necessary to carry out the purposes of this Plan.

5.06 The Trustees may choose any method of distribution of benefits as outlined in Section 3.04. Such distribution shall include the value of the Policy on the Participant's life as well as the portion of the Auxiliary Investment Fund used in determining the benefits.

Article VII

Termination of Employment

6.01 (a) A Participant whose employment with the Employer is terminated for any reason other than by death or disability and before he qualifies for a retirement benefit shall have a vested interest in a retirement benefit on the normal form payable on the Normal Retirement Date, as follows:

(A) In case of a Fully Insured Plan, the benefit shall be such as may be provided by a fraction of the value of the Policies on the date of termination, purchased on the Participant's life; such fraction as indicated in the Adoption Agreement (see item 12).

(B) In case of a Combination Plan the following applies:

(i) Defined Benefit Plan: The benefit shall be such as may be provided on the basis of the guaranteed settlement option rates contained in the Policies purchased on the Participant's life (or their actuarial equivalent)

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by a fraction of the value of such Policies on the date of termination, increased by a fraction of the Participant's actuarially adjusted allocable portion of the Auxiliary Investment Fund (see Section 13.04 b); both of these fractions as indicated in the Adoption Agreement (see item 12). In no event however shall the benefit exceed the maxima stated in section 5.02 (B) (i) (ii) and (iii) for Plans other than Integrated Defined Benefit Offset Plans, and for Integrated Defined Benefit Offset Plans, respectively, with the further modification that the reduction factor of 1/15 stated therein, shall not apply for the determination of a benefit payable on the Normal Retirement Date.

(ii) Money Purchase Plan: The benefit shall be such as may be provided by a fraction of the value of the Policies purchased on the Participant's life increased by a fraction of the Participant's allocable portion of the Auxiliary Investment Fund (see Section 13.04 c); both of these fractions as indicated in the Adoption Agreement (see item 12).

(b) Notwithstanding any provision in (a) above to the contrary, benefits shall be determined at or after age 60 and completion of fifteen years of continuous Employment by the use of the full applicable values.

6.02 (a) The Trustees may choose any method of distribution of benefits as outlined in Section 3.04, in respect of Policies on the Participant's life, as well as the portion of the Auxiliary Investment Fund.

(b) The Trustees shall offer all Policies to the terminated Participant, in person or by registered or certified mail addressed to his last known address, for a price equal to the difference between the cash value of the Policy and the amount to which he is entitled on the basis of a cash settlement. If the terminated Participant shall purchase the Policy or if he shall otherwise be entitled to the entire value of the Policy, the Trustees shall transfer the Policy to him free and clear of the Trust but subject to the limitations set forth in Section 3.02(d) hereof. If the terminated Participant does not reply to the offer of the Trustees within 30 days of the date the offer was made, the Trustees shall have full right and authority to take any action permitted by the Insurer with respect to the Policy in order to make available to the terminated Participant any amounts to which he is entitled and to recover any excess. Such excess must not be applied to increase the benefits any Participant would receive under the Plan.

6.03 Except after termination of the Employer's participation in the Plan (Section 10.02) or after discontinuance of the Employer contributions to the Plan (Section 10.04), notwithstanding anything herein contained to the contrary, if the termination of a Participant's employment shall have resulted from his discharge for proven dishonesty, he shall forfeit his rights to benefits under the Plan.

6.04 A leave of absence for reasons of military service or as authorized by the Employer in writing for a period not exceeding two years in duration shall not be considered a termination of employment, provided the employee returns to the service of the Employer on or prior to the expiration date of such leave or within 90 days of his original separation from such military service. If the Employee does not so return, he shall be deemed to have terminated his employment when the leave of absence commenced. The Trustees shall take appropriate action to recover any values created by premiums paid while the Employee was on leave, may name themselves Beneficiary, and shall thereafter apply the provisions of Section 6.01.

6.05 If the Policy on the life of a terminated Participant is to be held in the Trust for some time before recovering the equity of the Trust, the Trustees shall take the necessary steps to change the Beneficiary of the Policy to the Trustees. If the terminated Participant should die while the Trustees are so designated, the Trustees shall collect any death benefit payable and shall pay any amount in excess of the equity of the Trust to the Beneficiary who would have received payment under the Policy if the Trustees had not been named Beneficiary. If the Trustees have not been named Beneficiary, any death benefit payable under a Policy on the life of a terminated Participant shall be payable as provided in the Policy.

Article VII

Contributions to the Trust

7.01 Subject to the provisions of Section 8.01, the Employer agrees to pay to the Trustees the gross policy premium, offset, for defined benefit plans, only by all Policy dividends. In the event the Employer has selected a Combination Plan, the Employer also agrees to pay to the Trustees such additional amounts, to be invested as part of the auxiliary investment fund, as may be determined to be necessary to provide the benefits specified hereunder. In the case of a money purchase plan, the maximum and minimum annual contribution shall be as selected in the Adoption Agreement (see item 7).

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- 7.02 The Trustees shall pay the initial premium and subsequent premiums from funds made available by the Employer and from the General Fund. If funds are insufficient, the Trustees may borrow to pay the premiums, provided that if a loan is made on the Policies, it shall be proportional to the premiums providing there is sufficient cash value. If there is insufficient cash value the deficiency shall be borrowed on the same proportional basis. Any repayment of loans shall also be made on the same proportional basis used in making the loans. The Trustees shall have no duty to pay premiums in excess of the available funds. The Trustees shall not pay premiums on Policies on the lives of Participants who have terminated employment unless it should be necessary to obtain equities for the Trust.
- 7.03 All amounts which are contributed by the Employer to the Trustees shall be irrecoverable contributions to this Trust until conditions described in section 12.09 or Article X are satisfied.
- 7.04 If so provided in the Adoption Agreement (see item 11), each Employee shall contribute annually an amount as stated towards the cost of the Plan. Such amount shall be first applied towards the cost of the death benefit provided under the Policies.

Article VIII

General Fund

- 8.01 The Trustees shall establish a Fund to be known as the General Fund. All amounts received by the Trustees (other than contributions to the auxiliary investment fund) to which Participants, terminated Participants, or their Beneficiaries are not entitled shall be placed in the General Fund. Such Fund shall, to the extent available, be used by the Trustees for the next premium liability which the Employer would otherwise have, whether for initial or renewal premiums.

Article IX

Amendment of Plan and Adoption Agreement

- 9.01 Subject to the provisions of Sections 9.04 and 9.05, the Employer, and the Trustees as initially and subsequently designated, hereby delegate authority to The Guardian Life Insurance Company of America to amend this Plan and Adoption Agreement at any time and such amendments are deemed made with the Employer's and the Trustees' consent on their behalf. Such amendments by the Insurer may be executed without the consent of any other party and shall be stated in instruments executed by the Insurer in the same manner and form as this Plan and Adoption Agreement, copies of which shall be provided to each Employer who shall provide copies of same to the Trustees. Such amendments by the Insurer shall bind each Employer, Trustee, and all Participants and their Beneficiaries hereunder. It is the intention of the Insurer to limit its actions under this Section to minor and procedural changes, and such changes as may be advisable to maintain the qualification of the Plan under the provisions of the Internal Revenue Code of 1954, as amended.
- 9.02 Subject to the provisions of Sections 9.04 and 9.05, the Employer shall have the right to amend the previously made elections of its Adoption Agreement, at any time, as it pertains solely to its adoption of the Plan, without the consent of any other party. Such amendment shall be stated in an instrument executed by the Employer in the same form as the Adoption Agreement, and copies of such amendment shall be provided to the Insurer.
- 9.03 Subject to the provisions of Sections 9.04 and 9.05, the Employer shall have the right to amend the Plan, at any time without the consent of any other party. However, such amendment by the Employer shall apply solely to the Employer and to the Employer's Employees participating in the Plan. Such amendment by the Employer shall not apply to this Plan and Trust Agreement as it applies to other participating Employers, their Employees and Beneficiaries. Such amendment will cancel the pre-approved prototype status of the Plan and will cause the Plan to be considered by the Internal Revenue Service in its entirety as a Plan individually drawn and submitted by the Employer for approval.
- 9.04 No amendment shall vest in the Employer, directly or indirectly, any right, title, interest, or control over any Policies purchased hereunder, or over any trust funds subject to the terms of this Plan. No trust assets shall, by reason of any amendment, be used for, or diverted to, purposes other than for the exclusive benefit of Participants, Retired Partici-

plans, and their Beneficiaries. No amendment shall reduce any vested right or interest to which any Participant, Retired Participant, or Beneficiary is then entitled hereunder. The Employer may, however, make such retroactive amendments as may be required by the Internal Revenue Service in order to initially qualify, or maintain the qualification of, the Plan under the appropriate provisions of the Internal Revenue Code of 1954, as amended.

- 9.05 No amendment shall, without the written consent of the Insurer, deprive the Insurer of any of its exemptions and immunities; nor shall such amendment change the duties, responsibilities, rights or privileges of the Insurer, or change any provisions of any Policy. If any amendment by the Employer affects the rights, duties, responsibilities, or obligations of the Trustees hereunder, such amendment may be made only with the consent of the Trustees. Any amendment to the Plan providing for the issuance of Policies on a basis contrary to the Insurer's practice at that time will not obligate the Insurer to issue such Policies. Any amendment to the Plan made by the Employer in accordance with the provisions of this Section shall become effective when a signed copy has been delivered to the Insurer.

Article X

Employer Termination of Participation in Plan

- 10.01 The Employer reserves the right to terminate its participation in the Plan as to its Employees at any time. Such termination shall be evidenced by a written termination notice executed by the Employer (on the order of its Board of Directors if a corporation), shall be filed with the Insurer within 30 days, and shall be delivered to the Trustees. Such termination notice shall be effective as of the termination date specified therein; however, it shall not vest in the Employer any right, title or interest in, or control over, any policies purchased hereunder, or over any trust funds subject to the terms of this Plan. Upon such termination, the Employer shall have no further liability to contribute to the Plan.
- 10.02 Upon termination of the Employer's participation in the Plan under Section 10.01, all Policies acquired for the benefit of each Participant shall be delivered to each Participant, and any trust funds subject to the provisions of this Plan shall be distributed to each Participant according to his individually allocated share. Upon such distribution, the Trustees shall be discharged from all obligations under the Plan.
- 10.03 The Employer's participation under the Plan shall terminate in the event of (a) a legal adjudication of the Employer as a bankrupt, (b) a general assignment by the Employer to or for the benefit of its creditors, (c) dissolution of the Employer, (d) sale or transfer of the Employer to another business organization, or (e) merger or consolidation of the Employer with another business organization, unless the Plan is continued by a successor to the Employer, by agreement with the Trustees assuming the liabilities of the Plan.
- 10.04 In the event of discontinuance of the Employer contributions to the Plan, which would constitute termination or abandonment, the Participants shall immediately have a full vested interest in the Policies and in the allocable portion of the Auxiliary Fund (Section 13.04).
- 10.05 Notwithstanding any provision in this Plan to the contrary, the benefits provided by the Employer's contributions for Participants whose anticipated annual benefit provided by such contributions will exceed \$1,500, but applicable only to the twenty-five highest-paid Employees as of the time of the establishment of the Plan (including any such highest-paid Employees who are not Participants at that time but may later become Participants) shall be subject to the following conditions:
- (a) Such benefits shall be paid in full which have been provided by the Employer's contributions not exceeding the larger of the following amounts:
 - (1) \$20,000; or
 - (2) An amount equal to 20% of the first \$50,000 of the Participant's average regular annual compensation multiplied by the number of years between the date of the establishment of this Plan and (i) the date that the Plan terminates, or (ii) if benefits become payable to a Participant described in the first paragraph of this Section within ten years after the date of the establishment of this Plan, the date the benefits of such Participant first become payable (if before the date of termination of this Plan), or (iii) if benefits become payable to a Participant described in the first paragraph of this Section after the Plan has been in effect for ten years and if the full current costs of the Plan for the first ten years have not been met, or if the full current costs have not been met on the dates referred to in (i) or (ii) above, the date of the failure to meet the full current costs.
 - (b) If (1) this Plan is terminated within ten years after the establishment of this Plan, or (2) the benefits of any of the

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Participants described in the first paragraph of this Section become payable within ten years after the establishment of this Plan, or (3) the benefits of any of the Participants described in the first paragraph of this Section become payable after this Plan has been in effect for ten years and, at the time such benefits become payable, the full current costs for the first ten years have not been met, the benefits which any of the Participants described in the first paragraph of this Section may receive from the Employer's contributions shall not exceed the benefits set forth in paragraph (a) of this Section. This limitation shall cease to be effective at such time, at or after the expiration of ten years from the date of the establishment of this Plan, as the full current costs of the Plan have first been met.

- (c) If an Employer's Plan has been changed so as to increase substantially the extent of possible discrimination as to contributions and benefits payable in the event of a subsequent termination of the plan, the period of ten years mentioned in subsection (b) above will be counted from the effective date of such change in respect of the increased portion of the benefits.
- (d) If a Participant described in the first paragraph of this Section leaves the employ of the Employer or withdraws from participation in this Plan, the benefits which he may receive from the Employer's contributions shall not at any time, within the first ten years after the date of the establishment of this Plan, exceed the benefits set forth in (a) herein. If, at the end of ten years after the date of the establishment of this Plan, the full current costs of the first ten years have not been met, the benefits such Participant may receive from the Employer's contributions shall not exceed the benefits set forth in (a) herein until the first time that the full current costs of this Plan have been met.
- (e) These conditions shall not restrict the full payment of any insurance, death or survivor's benefits on behalf of a Participant who dies while this Plan is in full effect and its full current costs have been met.
- (f) These conditions shall not restrict the current payment of full retirement benefits called for by this Plan for any retired Participant while this Plan is in full effect and its full current costs have been met.
- (g) In the event of termination of this Plan within the period during which paragraph (b) hereof is effective, distributions to then unretired Participants, other than the Participants described in the first paragraph of this Section, shall include an equitable apportionment among such other Participants of all excess benefits purchased by Employer contributions for the Participants described in the first paragraph of this Section, in the manner following: to each such other Participant in the ratio that the reserve liability then attributable to him bears to the total reserve liability under this Plan.
- (h) This Section is included in this agreement to conform to the requirements of Treasury Regulation Section 1.401-4(c) and shall cease to be effective at such time as the provisions of Treasury Regulation Section 1.401-4(c) or any substitute therefor are no longer effective or applicable.

Article XI

The Trustees

- 11.01 The Board of Directors shall appoint one or more Trustees who shall have all powers necessary for the performance of their duties hereunder. The Trustees may, but need not be, officers or employees of the Employer.
- 11.02 The Trustees shall serve at the pleasure of the Employer with such compensation as may be prescribed by him. Any Trustee may resign by a written notice addressed to the Employer. The Employer shall fill any vacancies in the membership of the Trustees which may occur from time to time. The appointment of a Trustee shall become effective upon his acceptance in writing addressed to the Employer, and upon such acceptance such Trustee shall be vested with all the rights, powers, and duties of his predecessor.
- 11.03 The Trustees shall have the power and authority either alone or on advice of counsel to reconcile any inconsistencies and to construe and interpret the provisions of the Plan, and to determine all questions with respect to the individual rights of Participants, Retired Participants, and their Beneficiaries.
- 11.04 The Trustees shall be free of any liability, joint or several, to the Employer, any Employee, any Participant, Retired Participant or Beneficiary for acts or failures to act as Trustees in connection with the Plan, except that each Trustee shall be liable for his own willful misconduct or gross negligence.
- 11.05 The Trustees shall act by majority vote, and action may be taken either by a vote at a meeting or in writing without

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a meeting. Any one Trustee may sign, on behalf of all, applications for policies or any papers which may be required by the Insurer.

- 11.06 The Trustees shall receive all contributions to the Plan, and such contributions, together with all Policy dividends and refunds, amounts received by the Trustees under any Policy that are not distributable to Participants or their Beneficiaries, and all other property held from time to time hereunder, shall be held, managed, and administered in trust pursuant to the terms of the Plan.
- 11.07 No Trustee shall be precluded from becoming a Participant under the Plan upon his meeting the eligibility requirements, set forth in Section 2.01.
- 11.08 The Employer shall reimburse the Trustees for any reasonable expenses, including counsel fees, incurred in the administration of the Plan.
- 11.09 The Trustees shall keep accurate and detailed accounts of the transactions effected by them hereunder and all accounts, books and records relating thereto shall be open for inspection at all reasonable times by the Employer, or any person designated by him. A Participant may inspect the Trustees' records but only insofar as they relate to his own participation.
- 11.10 As soon as practicable after the close of each Trust year, and at such other times as the Employer may direct, the Trustees shall file with the Employer a written account, setting forth all receipts, expenditures, and other operations of the Plan during the period since the date of the last previous accounting. Upon the expiration of thirty days from the date of filing such accounting with the Employer, the Trustees shall be forever released and discharged from all liability and accountability to anyone with respect to the propriety of their acts and transactions shown in such account, except with respect to any such acts or transactions as to which the Employer shall file with the Trustees written objections within such thirty-day period. Nothing herein contained, however, shall deprive the Trustees of their right to have any of their accounts judicially settled by a court of competent jurisdiction.
- 11.11 The Trustees shall not be required to give bond or other security for the faithful performance of their duties, unless required by law.
- 11.12 The Trustees shall be fully protected in relying upon any written instructions and directions of the Employer, and in taking any action upon any instrument believed by the Trustees to be genuine and signed and presented by the proper person or persons. The Trustees shall be under no duty to make any investigation or inquiry as to any statement contained in any such writing, but may accept the same as conclusive evidence of the truth and accuracy of the statements therein contained.
- 11.13 In the event that any dispute shall arise as to any act to be performed by the Trustees, they may postpone performance until adjudication of such dispute in a court of competent jurisdiction or until they are indemnified against loss to their satisfaction.

Article XII

Miscellaneous

- 12.01 The adoption and maintenance of the Plan shall not be deemed to constitute a contract between the Employer and any Participant or Employee, or to be a consideration for, inducement to, or condition of employment of any person. Nothing herein contained shall be construed to give any Participant the right to be retained in the employ of the Employer or to interfere with the right of the Employer to terminate the employment of any Participant at any time.
- 12.02 Wherever it is herein provided that any person or persons concerned with the administration of the Plan shall exercise discretion in the making of any decision, such discretion shall be exercised so as not to discriminate among persons similarly situated.
- 12.03 A copy of the Plan and any and all future amendments thereto shall be available to the Plan Participants for inspection at all reasonable times.
- 12.04 Except as to indebtedness to the Employer, or Insurer, no right or interest of any kind in any trust assets shall be transferable or assignable by a Participant or Retired Participant or their Beneficiaries, or be subject to alienation, encumbrance, garnishment, attachment, execution, or levy of any kind, voluntary or involuntary. If any Participant attempts to alienate or assign such benefits or should such benefits be subject to any of the above legal or equitable

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- processes, the Trustees shall take the necessary steps so that such benefits shall not be available to the Participant, and such benefits shall be used by the Trustees for the benefit of the Participant or for his Beneficiaries.
- 12.05 Neither the Employer nor the Trustees shall be responsible for the validity of any Policies or for the failure on the part of the Insurer to make any payments or to provide any benefit under any policy, or for the action of any person which may render any policy invalid or unenforceable. The Employer and the Trustees shall not be responsible for any failure to perform or delay in performing any act occasioned by any Policy provisions or restrictions imposed by the Insurer or any other person. In the event that it becomes impossible for the Employer or the Trustees to perform any act under the Plan, that act shall be performed which in the judgment of the Employer or of the Trustees will most nearly execute the provisions of the Plan.
- 12.06 In no event shall the Insurer be considered a party to the Plan nor to any modification or amendment thereof or supplement thereto. Nothing in the Plan nor in any modification, amendment or supplement thereto shall in any way be construed to enlarge, change, vary, or in any way affect the obligations of the Insurer as expressly provided in the Policies. It is understood that the Insurer may deal with the Trustees alone in accordance with the terms and conditions of the Policies and in such manner as the Trustees and the Insurer shall agree, without the consent of any other person or persons interested in the Plan. The Insurer shall not be required to examine the provisions of the Plan or of any modification, amendment or supplement thereto. The Insurer shall not be responsible for the failure of the Trustees to perform their duties as such, nor for the application or disposition of any money paid or to be paid to the Trustees; and such payment shall fully discharge the Insurer for the amount so paid.
- 12.07 Under no circumstances shall any part of the corpus or income of the Plan be used for, or diverted to, purposes other than for the exclusive benefit of the Employees and Beneficiaries. The Plan shall at all times be interpreted and administered in accordance with the applicable provisions of Section 401(a) of the Internal Revenue Code of 1954, as now in effect or as hereafter amended. Any funds contributed to the Plan, and any assets of the Plan shall not revert to, or be used by or for the benefit of the Employer.
- 12.08 The Plan embodied herein shall be construed according to the laws of the State in which the Employer has its principal office.
- 12.09 Anything to the contrary herein contained notwithstanding, if the District Director of Internal Revenue having jurisdiction over the Employer shall disapprove initially the Employer's participation in the Plan for all tax purposes within the time limit set for such action by the Insurer, the Plan shall be of no force or effect as to the Employer, and without the assent of any other party, the Employer shall be entitled to recover all contributions paid into the Plan, with the exception of the term cost of any intervening life insurance protection, any expenses or commission incurred by the Insurer, and other administrative expenses incurred by the Trustees.
- 12.10 If after initial approval of this Plan by the District Director of Internal Revenue the Employer at a later date fails to retain its qualified status, he shall no longer be regarded as participating in this preapproved Prototype Plan, and his Plan shall be regarded as an individually drawn plan.

Article XIII

Auxiliary Investment Fund

The following provisions of this Article XIII shall apply solely in the event the Employer selects a Combination Plan, designated in the Adoption Agreement.

- 13.01 The Trustees shall maintain an auxiliary investment fund for the purpose of accumulating funds necessary for the exercise of the annuity options at retirement date. The Trustees shall invest and reinvest the principal and income of the auxiliary investment fund, without distinction between principal and income, in such securities or in such property, real or personal, wherever situated, as the Trustees may deem advisable, including, but not limited to, stocks, common or preferred, bonds and mortgages, mutual funds and other evidences of indebtedness or ownership. In making such investments, the Trustees shall not be restricted to securities or other property of the character authorized or required by applicable law from time to time for trust investments.
- 13.02 The Trustees shall have the following powers and authority in the administration and investment of the auxiliary investment fund:
- (a) to purchase, or subscribe for, any securities or other property, and to retain the same in trust;

- (b) to sell, exchange, convey, transfer or otherwise dispose of any securities or other property held by them by private contract or at public auction. No person dealing with the Trustees shall be bound to see to the application of the purchase money or to inquire into the validity, expediency, or propriety of any such sale or other disposition;
- (c) to vote upon any stocks, bonds or other securities; to give general or special proxies or powers of attorney with or without power of substitution; to exercise any conversion privileges, subscription rights, or other options, and to make any payments incidental thereto; to oppose, or to consent to, or otherwise participate in, corporate reorganizations or other changes affecting corporate securities, and to delegate discretionary powers, and to pay any assessments or charges in connection therewith; and generally to exercise any of the powers of an owner with respect to stocks, bonds, securities or other property held as part of the auxiliary investment fund;
- (d) to cause any securities or other property held as part of the auxiliary investment fund to be registered in their own names as Trustees, or in the name of one or more of their nominees, and to hold any investments in bearer form, but the books and records of the Trustees shall at all times show that all such investments are part of the auxiliary investment fund;
- (e) to borrow or raise money for the purpose of the Trust in such amount, and upon such terms and conditions, as the Trustees may deem advisable; and, for any sum so borrowed, to issue their promissory note as Trustees, and to secure the repayment thereof by pledging all, or any part, of the auxiliary investment fund; and no person lending money to the Trustees shall be bound to see to the application of the money lent or to inquire into the validity, expediency, or propriety of any such borrowing; and
- (f) to keep such portion of the auxiliary investment fund in cash as the Trustees may, from time to time, determine to be in the best interests of this Trust, without liability for interest thereon.

13.03 The Trustees shall value the trust assets and liabilities annually as of each Anniversary Date for the purpose of determining what contributions the Employer must make for the next subsequent Plan year.

13.04 A Participant's allocable portion of the Auxiliary Investment Fund for the purpose of this Agreement and the Adoption Agreement shall be as follows:

- (a) For Defined Benefit Plans such portion shall be determined using the same tables of mortality, interest and turnover, adopted by the Trustees and agreed to by the Director of Internal Revenue, used in calculating the deposits to the Auxiliary Fund and shall bear the same ratio to the market value of the Auxiliary Fund as the accumulated amount of the deposits on behalf of such Participant on the Anniversary Date just preceding the date of his retirement or termination bears to the accumulated deposits of all Participants in the Plan. Such accumulation shall be on the same actuarial basis used in calculating the deposit.
- (b) The actuarially adjusted allocable portion for Defined Benefit Plans shall be the actuarial net level premium reserve (based on the same tables of mortality, interest and turnover adopted by the Trustees and agreed to by the Director of Internal Revenue as are used in calculating the deposits to the Auxiliary Fund) on the additional amount required by the Insurer to provide the Retirement Benefit on the Normal Retirement Date (see Section 5.01) calculated as a Pure Endowment Benefit maturing on such date.
- (c) For Money Purchase Plans such portion shall be determined using the contribution made to the fund for the Participant adjusted for gains or losses and shall bear the same ratio to the market value of the Auxiliary Fund as the accumulated amount of the deposits on behalf of such Participant on the Anniversary Date just preceding the date of his retirement or termination bears to the accumulated deposits of all Participants in the Plan.

In determining a Participant's share the Trustee may accept the computation of the Insurer or may make such computation himself or have them made by a competent Actuary in his sole discretion. The result of such computation acceptable to the Trustees shall be final and binding on the Participant.

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COUNSELLOR AT LAW

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GREENLAWN, N. Y. 11740

(516) 757-0820

NEW YORK OFFICE:
666 FIFTH AVENUE
NEW YORK, N. Y. 10019
212-765-0700

July 6, 1976

Re: Estate of Irving Kandell vs. Trustees of Raydell Publishing &
Distributing Corporation Employees Pension Trust

Dear Sirs:

On or about November 15, 1971, the defendant in this instance entered into an agreement with the Raydell Publishing & Distributing Corporation to establish a pension plan for its respective participants and employees of the firm. The Trustees in this instance were designated by the corporation and they were specifically Irving Kandell and Raymond Lussa. In such instance the corporation did, for purposes of practicalities, adopt an agreement called an adoption agreement established by the Guardian Life Insurance Company, known as Guardian Life Insurance Variable Form Prototype Pension Plan. They did simultaneously enter into a trust agreement established by the insurance company to conform thereto to all legal requirements. It was after that date that the corporation did enter into an amendment whereupon they did change certain of the language of such agreement in order to conform to their needs as the case applied. Specifically, the most important aspects amended item 10 of the adoption agreement thereto.

The decedent in this instance did die after the plan had been in existence for sometime.

On or about November 15, 1973, a calculation was performed by the company who was administering the plan, specifically, P.F.R. Planning, Inc., who were retained by Raydell Publishing & Distributing Corporation in order to do the various actuarial calculations, as well as calculation of benefits for each of the participants. As of November 15, 1973, based upon a \$60,000 salary, the company did calculate that Mr. Irving Kandell's monthly pension was \$1,485, based upon that actual salary. They stated in their work sheet that the prior funded pension benefit was \$1,415 a month. It was known, in accordance thereto, that the participant, Irving Kandell, was insured in accordance with the trust, to \$100,000 of insurance, which was less than was required under the plan.

Continued.....

However, there was this modification which was previously stated, "the death benefit under this plan shall be the full amount of any death benefit payable under a policy plus the deceased's participant's actuarial adjusted portion of the auxiliary investment fund. In no event shall the death benefit be greater than would be provided if this was a fully insured plan."

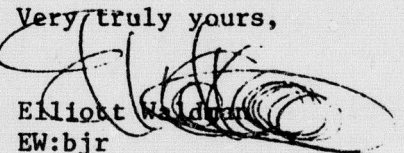
The interpretation of the aforementioned language then means that the individual, Irving Kandell, in this instance was entitled to \$100,000 plus the amount of auxiliary fund that would have been accumulated for the participant's at that particular moment. Accordingly, we would assume that he would have been entitled to either \$148,500 or in this instance, \$100,000 plus that which would have been the reserve of the participant's behalf at the time of his demise. Under the circumstances, it would have been \$100,000 plus whatever the accumulation would have been in the auxiliary fund at that particular moment.

Based upon a letter submitted by the P.F.R. Planning, Inc. to the accountant, on April 8, 1975, whereby they specifically did state "the reduction of benefits in Mr. Kandell's death created a large surplus in the separate investment fund. We have spread the surplus to Mr. Lussa's normal retirement date," and they proceeded to calculate the amount of contribution that would be required for the plan.

Based upon the documents submitted and as they have been adopted by Raydell Publishing & Distributing Corporation, and in the manner that they have previously calculated the benefits, up until the death of Mr. Kandell, our contention is that the estate, in this instance, is entitled to the full \$118,000 of benefits or more as the case may be, irrespective of what the interpretation is. It is our contention at this moment, that the employer is deriving an undue benefit, as well as the trustee not operating this plan in accordance with the total provisions. There is an unreasonable windfall to the corporation, as well as the trustees and surviving participants under this plan, and it is not being operated to the benefit of the participants or their beneficiaries in accordance with the way the plan has been drafted. It is our contention that the plan is discriminatory in its operation, has violated the rules dictated by the Internal Revenue Service, as well as violating the trustee responsibility to maintain the benefits for the participants. There should not be any unreasonable and unjust rewards payable to subsequent or continued participants at the expense of the decedent in this instance.

We hopefully expect to receive the amount in question since we do believe this amount has been properly ascertained in accordance with all provisions.

Very truly yours,


Elliott Waldman
EW:bjr

LEONARD I. FISCHER, P. C.

ATTORNEY AT LAW
486 5TH AVENUE
NEW YORK, N. Y. 10017
(212) 661-5877

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Attached to Plaintiff's Supplemental Post-
Hearing Memorandum, Document No. 10

COUNSEL TO SHORE & REICH, P. C.

March 14, 1975

Raydell Publishing & Distributing Corp.
311 West 43rd Street
New York, New York 10036

Re: Raydell Publishing & Distributing
Corporation Employees Pension Plan

Dear Sirs:

We understand that Mr. Irving Kandell, a participant in the abovementioned Plan died on December 10, 1974 and you have requested our opinion concerning how the death benefit for Mr. Kandell should be calculated.

Your Plan provides that the death benefit shall be:

"the full amount of any death benefit payable under a policy plus the deceased Participant's actuarially adjusted portion of the Auxiliary Investment Fund. In no event shall the death benefit be greater than would be provided if this was a Fully Insured Plan."

The term "Participant's actuarially adjusted portion of the Auxiliary Investment Fund" is defined as:

"determined using the same tables of mortality interest and turnover, adopted by the Trustees and agreed to by the Director of Internal Revenue, used in calculating the deposits to the Auxiliary Fund and shall bear the same ratio to the market value of the Auxiliary Fund as the accumulated amount of the deposits on behalf of such Participant on the Anniversary Date just preceding the date of his retirement or termination bears to the accumulated deposits of all Participants in the Plan. Such accumulation shall be on the same actuarial basis used in calculating the deposit."

LEONARD I. FISCHER, P. C.

ATTORNEY AT LAW
485 5TH AVENUE
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(212) 661-6577

78 a

COUNSEL TO SHORE & REICH, P. C.

Raydell Publishing & Distributing Corp.
Page Two

March 14, 1975

It is further provided that such amount shall be the actuarial net level premium reserve on the additional amount required by the Insurer to provide the Retirement Benefit on the Normal Retirement Date calculated as a pure Endowment Benefit maturing on such date.

Based upon the above, it is our opinion that the pension benefit for Mr. Kandell, deceased, should be calculated as of November 15, 1974, based upon his five highest consecutive years of earnings, and the death benefit should be the life insurance policy plus the amount which should be in the Auxiliary Fund on November 15, 1974 assuming the deposit which was due on that date was made. In no event, however, should the total death benefit exceed one hundred (100) times the monthly pension.

Please let me know if I can be of any further assistance.

Sincerely,

Leonard I. Fischer

LIF:gk

Opinion Of Whitman Knapp, U. S. D. J.

(Document No. 5)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

Following a hearing at which an expert witness for each party testified, the single issue in this case was presented to us as ripe for decision.

Irving Kandell and Raymond Lussa were the two sole officers and directors of the Raydell Publishing and Distributing Corporation and the sole two participants in its pension plan. Irving Kandell died on December 9, 1974 leaving plaintiff Anastasia Kandell his widow and designated beneficiary. Plaintiff has been paid the proceeds of the one hundred thousand dollar life insurance policy on her husband's life which was an integral part of the pension plan. The instant dispute concerns the method of computing the additional death benefit which both sides agree is due to the plaintiff pursuant to the plan. Plaintiff claims \$17,562.00

Opinion of Whitman Knapp, U.S.D.J.

based upon the decedent's last full year of earnings; the defendant has tendered \$8,700.00 based upon the decedent's five highest consecutive years of earnings.

At the hearing the parties relied exclusively upon their respective interpretations of the provisions of the pension plan. Although taken together those provisions offer no explicit definition of the basis to be used in computing death benefits, neither side argued that any particular section is ambiguous, and no one offered to introduce extrinsic or parol evidence of the intent of the drafter. No legal authority of any sort was cited, the parties apparently being content to be governed merely by our reading of the pension plan.

The plan is contained in several documents: the Adoption Agreement, the Guardian Life Variable Form Prototype Pension Plan and Trust Agreement ("the Plan") and certain Amendments. According to §4.04 of the Plan:

"The Participant's benefit at his Normal Retirement Date shall be based on the average of his compensation for the highest five (5) consecutive years"

According to §10 of the Adoption Agreement:

"The death benefit under a Policy shall be 100

times the anticipated monthly Retirement Benefit under the Plan."

Finally, according to §4 of the Amendments:

"The death benefit as set forth in item 10 of the Adoption Agreement is amended to read as follows:

The death benefit under this Plan shall be the full amount of any death benefit payable under a Policy plus the deceased participant's actuarially adjusted portion of the Auxiliary Investment Fund. In no event shall the death benefit be greater than would be provided if this was a Fully Insured Plan." 1/

Plaintiff argues that this amendment indicates that the basis for the death benefit is one year's salary, rather than the five year average which is the basis for the retirement benefit. Defendant argues that the amendment serves only as a definition and direction to the actuary. Further, defendant points out that all of the benefits under the plan are keyed to the retirement benefits.

Our reading of the various documents leads us to agree with defendant's interpretation of the plan. It seems clear that the retirement benefit is the central feature and thus it is reasonable for other benefits to be computed according to the same basis. Moreover, since the quoted sections are clearly intelligible and explicit with regard to the five year basis for the retirement benefit, we find it

difficult to believe that if a different basis were intended for the death benefit, the pertinent provisions would not have been equally intelligible and explicit.

Accordingly, we find for the defendant.

Submit judgment.

Dated: New York, New York
November 4, 1976.

WHITMAN KNAPP, U.S.D.J.

FOOTNOTE

- 1/ In §13.04 of the Plan a participant's allocable portion of the Auxiliary Investment Fund is defined as follows:
- (a) For Defined Benefit Plans such portion shall be determined using the same tables of mortality, interest and turnover, adopted by the Trustees and agreed to by the Director of Internal Revenue, used in calculating the deposits to the Auxiliary Fund and shall bear the same ratio to the market value of the Auxiliary Fund as the accumulated amount of the deposits on behalf of such Participant on the Anniversary Date just preceding the date of his retirement or termination bears to the accumulated deposits of all Participants in the Plan. Such accumulation shall be on the same actuarial basis used in calculating the deposit.

(b) The actuarially adjusted allocable portion for Defined Benefit Plans shall be the actuarial net level premium reserve (based on the same tables of mortality, interest and turnover adopted by the Trustees and agreed to by the Director of Internal Revenue as are used in calculating the deposits to the Auxiliary Fund) on the additional amount required by the Insurer to provide the Retirement on the Normal Retirement Date (see Section 5.01) calculated as a Pure Endowment Benefit maturing on such date.

Judgment of Whitman Knapp, U. S. D. J.

(Document No. 6)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

This cause, having come on for trial, and having been heard by the court on the pleadings and proofs of both parties, oral argument of counsel for both parties having been heard by the court and briefs having been filed by both parties, and it appearing that the only contest concerns the method of computing additional death benefits which plaintiff claims to be in the amount of SEVENTEEN THOUSAND FIVE HUNDRED and SIXTY TWO (\$17,562) DOLLARS and defendant claims to be in the amount of EIGHT THOUSAND SEVEN HUNDRED (\$8,700.00) DOLLARS.

It is hereby ordered, adjudged and decreed that the action be dismissed on the merits on tender of payment of EIGHT THOUSAND SEVEN HUNDRED (\$8,700.00) DOLLARS from defendant to plaintiff, and that the defendant, Raydell

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Judgment of Whitman Knapp, U.S.D.J.

Publishing and Distributing Corporation Employees Pension
Plan, recover of the plaintiff, Anastasia Kandell, its costs
and disbursements in this suit to be taxed.

Dated : December 17, 1976

Whitman Knapp,
U.S. District Court Judge

Memorandum of Whitman Knapp, U. S. D. J.

(Document No. 7)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

KNAPP, D. J.

The record indicates that the defendant tendered the amount due before the lawsuit was commenced and that the plaintiff, believing she was entitled to a larger sum, rejected the tender. Under those circumstances the plaintiff is not entitled to pre-judgment interest.

Accordingly, we have signed the judgment submitted by the defendant.

Dated: New York, New York
December 16, 1976.

WHITMAN KNAPP, U.S.D.J.

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Notice of Appeal

(Document No. 8)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

NOTICE is hereby given that ANASTASIA KANDELL, plaintiff above named hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment dismissing this action on the merits on tender of payment of eight thousand seven hundred (\$8,700.00) dollars from defendant to plaintiff entered in this action on the 20th day of December, 1976.

Dated : New York, New York

December 27, 1976.

ENGLANDER and ENGLANDER

By S/ Herman Englander
Member of Firm
Attorneys for Plaintiff
Office and Post Office Address
Fisk Building
250 West 57th Street
New York, New York 10019
Telephone: (212) 245-4340

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Appendix

IS HEREBY ADMITTED

THIS 18 DAY OF *March* 1977



Attorney(s) for *Dept of Soc*